Supreme Court Copy

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State Bar No. 255211

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANNY LEE SKILES, Defendant and Appellant.	Supreme Court No. S180567 Court of Appeal No. G040808

EXHIBITS A - E

TO APPELLANT'S MOTION TO TAKE JUDICIAL NOTICE OF DOCUMENTS PURSUANT TO EVIDENCE CODE SECTION 459 AND RULE 8.252, CALIFORNIA RULES OF COURT

EXHIBIT A-1

ASSEMBLY BILL NO. 333

CHAPTER 299

1965

AUTHOR Song et al
(Co-author Stanton, Cobey)

RECEIVED 5/19 1965

LAST DAY 5/24 1965

ACTION OF GOVERNOR 6/18 1965

Date MAY 10 1965

REQUESTS FOR DIGESTS

	Received		Received
✓ Legislative Counsel	☐	✓ Attorney General	☑

RECOMMENDATIONS

Health and Welfare Agency	☐
Highway Transportation Agency	☑
Resources Agency	☐
Youth and Adult Corrections Agency	☐

Date Requested		
	Adjutant General	☐
	Aeronautics Commission	☐
	Agriculture	☐
	Alcoholic Beverage Control	☐
	Atomic Energy Development	☐
	Banks	☐
	Compensation Insurance Fund	☐
	Consumer Counsel	☐
	Controller	☐
	Corporation Commissioner	☐
	Corrections	☐
	Disaster Office	☐
	Economic Development Agency	☐
	Education	☐
	Employees Retirement	☐
	Employment	☐
	Equalization	☐
5/10	✓ Finance	☐
	Fire Marshal	☐
	Fish and Game	☐
	Franchise Tax Board	☐
5/10	✓ General Services	☐
	Highway Patrol	☐
5/10	✓ Industrial Accident Commission	☐
5/10	✓ Industrial Relations	☐
	Insurance	☐
	Judicial Council	☐
		☐

Date Requested		
	Law Revision Commission	☐
	Mental Hygiene	☐
	Military Department	☐
	Motor Vehicles	☐
	Natural Resources	☐
	Personnel Board	☐
	Professional and Voc. Stds.	☐
	Public Health	☐
	Public Utilities Commission	☐
	Public Works	☐
	Real Estate	☐
	Reclamation Board	☐
	Rehabilitation	☐
	Savings and Loan Commission	☐
	Secretary of State	☐
	Social Welfare	☐
	State Lands Commission	☐
	Teachers Retirement System	☐
	Treasurer	☐
	Veterans Affairs	☐
	Water Quality Control Board	☐
	Water Resources	☐
	Youth Authority	☐
		☐
		☐
		☐
		☐

EXHIBIT A-2

LAW OFFICES
SONG, KELL & SCHWARTZ
MONTEREY PARK

DISTRICT OFFICE
814 SOUTH GARFIELD AVENUE
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Assembly
California Legislature

COMMITTEES
GOVERNMENTAL EFFICIENCY AND ECONOMY
JUDICIARY
CONSTITUTIONAL AMENDMENTS
ELECTIONS AND REAPPORTIONMENT

SACRAMENTO ADDRESS
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ALFRED H. SONG
MEMBER OF ASSEMBLY, FORTY-FIFTH DISTRICT

VICE CHAIRMAN
COMMITTEE ON GOVERNMENTAL EFFICIENCY AND ECONOMY

CHAIRMAN
SUBCOMMITTEE ON LAW REVISION

May 7, 1965

Hon. Edmund G. Brown
Governor, State of California
State Capitol

Dear Governor:

Senate amendments having gained Assembly concurrence on May 7, 1965, Assembly Bill 333 has completed the legislative process and is now ready for your signature.

AB 333 would establish a new Evidence Code in California, regulating the admission and exclusion of evidence before the California courts. The bill represents the first comprehensive revision and restatement of the law of evidence in California since 1872.

The bill is greatly needed to facilitate the administration of justice in our courts. Existing statutes are fragmentary, conflicting and unclear in many instances. Evidence Law, however, must be invoked in the midst of trials when there is no time to do extensive research to discover what the law is. This Code will give lawyers and judges an immediate source of the Law of Evidence and will end much of the confusion and uncertainty that now exist in the California Law of Evidence.

An immense amount of work went into the bill. The Law Revision Commission devoted seven years to its preparation. The Commission worked very closely with the State Bar, the Judicial Council, the Conference of Judges, and every other group, including 18 local bar associations that expressed an interest in the preparation of the Code. Wide publicity

was given to all of the Commission's proposals, and criticisms were invited from any and all sources. Extensive interim study was given to the Code by a Special Subcommittee of the Assembly Interim Committee on Judiciary.

The bill now has the unqualified endorsement of every group that will have to work with the law that it states. The Judicial Council, the Conference of Judges, the State Bar, the Attorney General, the District Attorneys' Association and the Department of Public Works all urged the passage of the bill. There is no opposition among the organized bar or the judiciary.

Mr. B. E. Whitkin, California's foremost authority on the Law of Evidence, has given the Code the highest praise. He testified during legislative hearings that "the pattern is brilliant and the advance is tremendous...." He, too, urged the passage of the bill.

Assembly Bill 333 is based on the legislation recommended by the Law Revision Commission in its Recommendation Proposing an Evidence Code (January 1965). I enclose a copy of this Recommendation. You will note that a Comment is found under each section of the new code as set out in the Recommendation. These Comments make clear the legislative intent and will provide a valuable source of information concerning the meaning and purpose of the various sections of the new code. The Comments contained in the Commission's Recommendation are supplemented and revised by Reports of the Assembly and Senate Judiciary Committees. See the Assembly Daily Journal for April 6, 1965 (pages 1712-1768) and the Senate Daily Journal for April 21, 1965 (pages 1573-1579). A copy of each daily journal is enclosed. We have been advised that the publishers of the California annotated codes will publish these Comments under the pertinent sections of the code so that they will be readily available to the members of the bench and bar. The publication of the Commission and legislative committee Comments is the same procedure that was followed in 1963 in connection with the governmental liability legislation. We have been informed that the Comments have been very helpful in interpreting the 1963 legislation.

The Commission prepared and distributed a number of tentative recommendations and research studies before drafting the new Evidence Code. I enclose a copy of each of these tentative recommendations and studies. This material is a valuable source of information concerning the existing California law. The procedure the Commission followed is described in more

detail on pages 3-8 of its Recommendation Proposing an Evidence Code.

You will also be interested in knowing that the Continuing Education of the Bar is planning a summer seminar program on the new code and is also planning a state-wide educational program to be help before the new code becomes operative on January 1, 1967.

Sincerely,

ALFRED H. SONG

AHS:dl
Enclosures

EXHIBIT A-3

PRESS RELEASE FROM

Assemblyman Alfred H. Song
Room 4017, State Capitol
Sacramento 14, California

FOR IMMEDIATE RELEASE
May 10, 1965

Assembly Bill 333, by Assemblyman Alfred H. Song (D), has just received the approval of both houses of the California Legislature.

The measure establishes a new Evidence Code in California, regulating the admission and exclusion of evidence before the California courts. The bill represents the first comprehensive revision and restatement of the law of evidence in California since 1872.

Song praised the California Law Revision Commission for "this monumental and significant contribution to the administration of justice in California."

The proposed Evidence Code is the culmination of seven years of work by the Commission. Also participating were the California State Bar Association, Judicial Council, Conference of California Judges, Association of District Attorneys, Attorney General, local bar associations, and many interested individuals.

The members of the Law Revision Commission are law professors John D. McDonough and Sho Sato, and attorneys Joseph Ball, Herman Selvin, Richard Keatinge, James Edwards and Thomas Stanton. Representing the State Legislature were Senator James Cobey and Assemblyman Song. Serving in an exofficio capacity was Legislative Counsel George H. Murphy.

The measure was the subject of a two year interim study by the Assembly Subcommittee on Law Revision, headed by Song.

The State Bar is planning a summer seminar program on the new code, as part of its continuing education program, to acquaint its lawyer members with the new laws on evidence.

Song hailed passage of the bill as constituting "a landmark in the annals and progress of California law that will prove to be invaluable to all judges, lawyers, litigants and students."

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EXHIBIT A-4

JAMES A. COBEY
TWENTY-FOURTH SENATORIAL DISTRICT
MERCED AND MADERA COUNTIES
CHAIRMAN, SENATE FINANCE COMMITTEE

CALIFORNIA LEGISLATURE

Senate

May 17th 1965

The Honorable Edmund G. Brown
Governor of California
State Capitol
Sacramento, California

Re: Assembly Bill 333

Dear Governor:

This bill is identical with my Senate Bill 110 of which it originated as a copy. I have dropped SB 110.

Assembly Bill 333, as a consequence, is the bill of the California Law Revision Commission establishing for the first time in California history a separate and complete Evidence Code.

As you know, part of the rules of evidence are presently stated in our Code of Civil Procedure, a larger portion is set forth in the decisional law of the state, and a third portion is not available in the law of this state.

What this new code will do is for the first time set out in one place the California Law of Evidence in complete, clear and relatively certain form. It is the first revision of the law of evidence in this state since 1872 and it will provide both the bench and bar with a succinct but complete handbook which they can carry into and use in court readily.

As you undoubtedly recall, this new code embodies some seven years of work on the part of the Law Revision Commission, along with lesser amounts by committees of the State Bar of California, the Judicial Council, the Conference of Judges

the District Attorney's Association and some 18 local bar associations as well.

It has received essentially the unanimous endorsement of the bar, the bench and law enforcement in this state.

I respectfully request that you sign this bill.

Respectfully yours,

James A. Cobey

JAMES A. COBEY

JAC:jcc
cc: Assemblyman Alfred H. Song

EXHIBIT A-5

To: Honorable Edmund G. Brown
Governor of California

Bill Report

From: Office of the Attorney General

A. B. No. 333

By WILLARD A. SHANK
Assistant Attorney General

May 12 , 1965.

We have examined the above bill and find no substantial legal objection thereto.

Willard A. Shank

EXHIBIT A-6

DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)

May 11, 1965

The Honorable Edmund G. Brown
Governor of California
State Capitol

Dear Governor Brown:

Re: Assembly Bill No. 333, Establishes an Evidence Code

This bill is the product of several years of intensive work by the Law Revision Commission to consolidate the provisions in the Code of Civil Procedure, Civil Code and the case law on evidence. This bill will make some substantial improvements in the rules of evidence in California courts.

It is urged that this bill be signed into law.

Respectfully submitted,

Emerson Rhyner
EMERSON RHYNER
Deputy Chief

APPROVED
Highway Transportation Agency

EXHIBIT A-7

State of California

Memorandum

AB 333

To : Honorable Edmund G. Brown
Governor of California

Date : May 7, 1965

File No.: 53:2:vw

Attn Mr. Frank Mesple
Legislative Secretary

From : Department of Employment
Albert B. Tieburg, Administrator
Employment Relations Agency

Subject: ~~Enrolled~~ Bill Report - Department of Employment and Department of Industrial Relations
AB 333 Author Song

This bill enacts a new Evidence Code, consolidating and revising the law relating to evidence. It amends, adds and repeals sections of various codes.

The bill becomes operative on January 1, 1967. The delay allows time for affected persons to become familiar with the new law.

The bill is a result of an intensive review by the California Law Revision Commission (see Commission recommendation, January, 1965). It has the general support of the bar and bench.

It affects this agency by spelling out the rules of privilege and making these rules applicable in administrative proceedings before the Unemployment Insurance Appeals Board and its referees and before the Industrial Accident Commission and its referees.

We are aware of no opposition to the bill.

I concur in the recommendation of Director Ernest B. Webb that the bill be approved.

Albert B. Tieburg

DE 10 Rev 5-64

EXHIBIT A-8

GEORGE H. MURPHY
LEGISLATIVE COUNSEL
BERNARD CZESLA
CHIEF DEPUTY
J. GOULD
OWEN K. KUNS
PRINCIPAL DEPUTIES
EDWARD F. NOWAK
DEPUTY IN CHARGE
LOS ANGELES OFFICE

STATE OF CALIFORNIA

Office of Legislative Counsel

3021 STATE CAPITOL, SACRAMENTO 95814
110 STATE BUILDING, LOS ANGELES 90012

May 12, 1965

REPORT ON ENROLLED BILL

A. B. 333 SONG: Adds, amends, repeals, secs. of various codes.

SUMMARY: Revises, consolidates and codifies in the Evidence Code the California law of evidence.

FORM: Approved.

CONSTITUTIONALITY: Approved.

TITLE: Approved.

George H. Murphy
Legislative Counsel

Philip V. Sarkisian

By
Philip V. Sarkisian
Deputy Legislative Counsel

PVS:mlv

EXHIBIT A-9

State of California — Resources and Management Agency

Memorandum

To : Honorable Edmund G. Brown
Governor of California

Attention: Mr. Frank Mesple
Legislative Secretary

Date : May 14, 1965

File No.:

From : Department of General Services

Subject: Enrolled Bill Analysis
Assembly Bill 333

History, Sponsor and Purpose:

Assembly Bill 333 revises, updates and codifies the law of evidence. The bill is the product of the Law Revision Commission and results from a seven year study. Senator Cobey and Assemblyman Song introduced identical bills in the Senate and Assembly, respectively. Assemblyman Song's AB-333, after amendment, survived, and Senator Cobey's SB-110 was withdrawn. As introduced, the bill contained provisions which would have made material changes in administrative adjudication proceedings. In the opinion of the Office of Administrative Procedure, these would have caused problems, and the Office succeeded in persuading the Law Revision Commission of the need for amendment to eliminate the problem provisions.

Effect and Comment:

The primary impact of this bill will be in civil and criminal proceedings. As to administrative adjudication proceedings, the bill continues in existence current law. Under existing law, privileges pertained in civil proceedings apply to administrative proceedings. This bill makes no change in that provision.

Recommendation:

This bill would not adversely affect administrative adjudication proceedings under the Administrative Procedure Act, and we therefore see no reason why it should not be signed.

Robert L. Harkness
ROBERT L. HARKNESS
Director of General Services

RLH:GRC:bh

EXHIBIT A-10

BILL MEMORANDUM

Date: May 17, 1965

To : GOVERNOR BROWN

From: FRANK A. MESPLÉ

ASSEMBLY BILL No. 333 By Song, et al (Co-author Senator Cobey)

VOTE: Senate 36 Ayes
2 Noes O'Sullivan and Rattigan

Assembly Unanimous

AB 333 revises, consolidates and codifies in the Evidence Code the California law of evidence. The bill becomes operative on January 1, 1967. The bill represents the first comprehensive revision and restatement of the law of evidence in California since 1872.

The Attorney General and Legislative Counsel have no substantial constitutional or legal objections to approval.

The new Evidence Code is the result of several years' work by the Law Revision, Commission, the State Bar, the Legislature, the Judicial Council, the Conference of Judges, local bar associations, and individual members of the bar.

The District Attorneys' and Peace Officers' Associations recommend approval.

The Departments of General Services, Public Works, Fish and Game, and Industrial Relations recommend approval.

Assemblyman Song and Senator Cobey, the authors, request approval.

Recommendation: Approve. (Williams)

EXHIBIT A-11

EXHIBIT B-1

Senate Bill No. 1166 Chapter 1099

Year 98 Regular Session

Author _____

Date Received _____

Last Day to Act _____

Action of Governor 9-3-98

EXHIBIT B-2

SACRAMENTO ADDRESS
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E MAIL SENATOR.KOPP@SEN.CA.GOV

DISTRICT OFFICE
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DALY CITY CA 94014-1980
650 301 1721

JOINT COMMITTEES
JOINT COMMITTEE ON FAIRS ALLOCATION AND CLASSIFICATION

JOINT COMMITTEE ON LEGISLATIVE AUDIT

JOINT COMMITTEE ON RULES

California State Senate

STATE SENATOR
QUENTIN L. KOPP
EIGHTH SENATORIAL DISTRICT
REPRESENTING SAN FRANCISCO AND SAN MATEO COUNTIES

CF

STANDING COMMITTEES
TRANSPORTATION - CHAIRMAN
AGRICULTURE & WATER RESOURCES
BUDGET AND FISCAL REVIEW
FINANCE, INVESTMENT & INTERNATIONAL TRADE
HOUSING AND LAND USE
LOCAL GOVERNMENT
PUBLIC SAFETY
REVENUE AND TAXATION

SELECT COMMITTEES
PROCUREMENT, EXPENDITURES AND INFORMATION TECHNOLOGY - CHAIRMAN
ALAMEDA CORRIDOR
GENETICS & PUBLIC POLICY
HIGHER EDUCATION
MARITIME INDUSTRY
PRISON MANAGEMENT
REDEVELOPMENT
TECHNOLOGICAL CRIME AND THE CONSUMER

SUBCOMMITTEES
BUDGET SUBCOMMITTEE NO. 2 ON RESOURCES ENVIRONMENTAL PROTECTION, JUDICIARY AND TRANSPORTATION - CHAIRMAN
FINANCE SUBCOMMITTEE ON CALIFORNIA-EUROPEAN TRADE DEVELOPMENT - CHAIRMAN
SUBCOMMITTEE ON THE AMERICAS

June 29, 1998

Hon. Pete Wilson
Governor, State of California
State Capitol
Sacramento, CA 95814

Senate Bill 177

Attention: Ms. Karen Morgan

Dear Governor Wilson:

I respectfully request your approval of Senate Bill 177 which replaces the outdated *Best Evidence Rule* (Evidence Code §1500) and its many exceptions with a modern and efficient rule governing proof of the content of a writing. The bill implements a recommendation of the California Law Revision Commission which was the drafter of the Evidence Code some years ago.

Under the *Best Evidence Rule*, a party trying to prove the content of a document at trial must introduce the original document. Although the rule is intended to prevent fraud and misinterpretation of writings, it is no longer a sensible means to that end:

- Because parties now routinely examine original documents in pretrial discovery, they can detect inaccuracies and fraudulent tampering before trial, rather than relying on the *Best Evidence Rule* in the midst of trial.

- The exceptions to the *Best Evidence Rule* are so numerous that the rule excludes very little evidence, yet its presumption of inadmissibility must be overcome each time a party seeks to prove the content of a document. The rule amounts to an unnecessary technicality that contributes to the inefficiency, undue consumption of trial time and undue expense in litigation.

- The *Best Evidence Rule* assumes that an original document is more difficult to manipulate than a copy. Modern technology undercuts that key assumption. It is much easier to manufacture an unauthentic original than in the past.

- New technologies present difficulties in applying the *Best Evidence Rule* because they complicate the task of identifying the original document.

The new rule in SB 177 addresses those problems. Known as the *Secondary Evidence Rule*, it provides that secondary evidence (other than oral testimony) may be used to prove the content of a writing unless (1) a genuine dispute exists concerning material terms of the writing and justice requires its exclusion, or (2) admission of the secondary evidence would be unfair. In a criminal case, secondary evidence is also inadmissible if the party seeking to prove the content of a writing has the original but has not produced it (with a few exceptions already in existing law).

The *Secondary Evidence Rule* is simple and straightforward, yet incorporates safeguards against misleading use of secondary evidence. Instead of concentrating on whether a document is an original, the rule correctly assesses whether a document is sufficiently reliable for the finder of fact to consider.

Coupled with existing pretrial opportunities to inspect original documents and the normal motivation of the parties to present convincing evidence, the *Secondary Evidence Rule* provides protection against misleading use of secondary evidence without an unreasonable presumption of inadmissibility. In light of the increasing use of new technologies in our state, as well as concern over the rising cost of litigation, SB 177 constitutes a significant improvement in trial procedure.

Thank you for your consideration in the matter.

Sincerely yours,

QUENTIN L. KOPP

QLK:df

Enclosure

EXHIBIT B-3

Legislative Counsel of California

BION M. GREGORY

State Capitol, Suite 3021
Sacramento, CA 95814-4996
(916) 445-3057
Telecopier: (916) 323-4703

Sacramento, California
June 23, 1998

Honorable Pete Wilson
Governor of California
Sacramento, CA 95814

Senate Bill No. 177

Dear Governor Wilson:

Pursuant to your request, we have reviewed the above-numbered bill authored by Senator Kopp and, in our opinion, the title and form are sufficient and the bill, if chaptered, will be constitutional. The digest on the printed bill as adopted correctly reflects the views of this office.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By
Marguerite Roth
Principal Deputy

MRR:nd

Two copies to Honorable Quentin L. Kopp, pursuant to Joint Rule 34.

EXHIBIT B-4

OFFICE OF CRIMINAL JUSTICE PLANNING

Enrolled Bill Report
OCJP 855 (12/96)

BILL NUMBER: SB 177
AUTHOR: Kopp
AS AMENDED: 5/5/97
SUBJECT: Evidence: proof of the content of a writing

Bill Summary

This bill would repeal the "best evidence rule" which requires the original of a writing to be offered in evidence to prove the content of the writing, and would replace it with the "secondary evidence rule" which would provide that the content of a writing may be proved by otherwise admissible secondary evidence.

Summary of Recommendation

The Office of Criminal Justice Planning recommends that the Governor **SIGN** SB 177. The Office of Criminal Justice Planning recognizes that this bill is the result of a study and recommendation of the California Law Revision Commission to replace the best evidence rule with a secondary evidence rule that serves the same ends but is more efficient and less costly for litigants and more adaptable to new technologies. OCJP is supportive of this concept. OCJP agrees with the Law Revision Commission that the fraud deterrence as a reason for best evidence rule is no longer valid. Even CACJ, an opponent to this measure agrees that in most cases, the best evidence rule is little hindrance to the admission of evidence. OCJP also agrees that the exceptions to the current best evidence rule has in fact made the rule obsolete. The number of exceptions which are described in this analysis demonstrated just how diluted this rule has become. Contained in this bill is a provision which narrows the application of the use of secondary evidence in a criminal action. It provides that a court shall exclude secondary evidence of a writing if the court determines that the original writings are in the proponent's possession and the proponent has not made the original documents available for inspection. This provision is in recognition of the narrower discovery rules in criminal cases.

Position

SIGN		
Legislative Analyst	***Date***	***Chief***
Scott B. Frizzie	6/22/98	Paul Waters
Deputy Director, Policy and Planning	***Chief Deputy***	***Executive Director***
Martin Gonzalez	David Snaw	Dean Shelton

Background

According the analysis prepared by the Senate Judiciary Committee, the best evidence rule was created in 1965 (Chapter 299) and took effect on January 1, 1967. The best evidence rule was adopted upon a recommendation from the California Law Revision Commission and was adapted from Code of Civil Procedure sections existing at that time.

According to the Law Revision Comments to Evidence Code Section 1500, the best evidence rule was designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." At the time of its creation, the rule contained ten (10) exceptions which either existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

Specific Findings

Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This is known as the "Best Evidence Rule." (Evidence Code 1500.)

This bill would repeal the Best Evidence Rule and replace it with the "secondary evidence rule," providing that the content of a writing may be proved by otherwise admissible secondary evidence unless: (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

Existing law provides that the best evidence rule shall not apply at preliminary examinations. (Penal Code Section 872.5.)

This bill would provide that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Analysis

1. A summary of the principal arguments in support of the bill is set out below (i.e. rationales for the best evidence rule no longer valid) :

1) Fraud deterrence : The Law Revision Commission believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions." (Best Evidence Rule , 26 Cal. L. Revision Comm'n Reports 369, 379 (1996).) The Commission's report also notes that with the advent of new technologies such as scanning and manipulating signatures it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

2) Minimizing misinterpretation : One of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. The Law Revision Commission Report states that while preventing misinterpretation of writings is an important goal, modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial." (Best Evidence Rule , 26 Cal. L. Revision Comm'n Reports 369, 381 (1996).)

3) Other ways to safeguard against fraud and misinterpretation : The Law Revision Commission believes that the best evidence rule is not the only protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

4) Costs of the rule outweigh benefits : According to the Law Revision Commission Report, the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend time and resources hunting down the "original" in order to avoid a best evidence objection.

5) Exceptions swallow the rule : There are numerous exceptions and qualifications to the best evidence rule. For example, both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original," meaning a Xerox copy, so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original. (Evidence Code 260; Federal Rule of Evidence 1001(4).)

Moreover, the best evidence rule itself contains many other exceptions to the requirement that the original be produced, including:

Printed representations of computer information and computer programs. (Section 1500.5.)
Printed representations of images stored on video or digital media. (Section 1500.6.)
Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence. (Sections 1501, 1505.)
Secondary evidence of unavailable writings. (Sections 1502, 1505.)
Secondary evidence of writings an opponent has, but fails to produce as requested. (Sections 1503(a), 1505.)
Secondary evidence of collateral writings that would be inexpedient to produce. (Sections 1504, 1505.)
Secondary evidence of writings in the custody of a public entity. (Sections 1506, 1508.)
Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute. (Sections 1507, 1508.)
Secondary evidence of voluminous writings. (Section 1509.)
Copies of writings that were produced at the hearing and made available to the other side. (Section 1510.)
Certain official records and certified copies of writings in official custody. (Sections 1530-1532.)
Photographic copies made as business records. (Section 1550.)
Photographic copies of documents lost or destroyed, if properly certified. (Section 1551.)
Copies of business records produced in compliance with Sections 1560-1561. (Sections 1562, 1564, 1566.)

The Law Revision Commission asserts that in light of the broad exceptions to the best evidence rule, adoption of the secondary evidence rule will not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just and workable.

Other proponents of the bill also contend that when considering the many exceptions to the Best Evidence Rule, combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Furthermore, they contend that creating any further exceptions to the rule is not an inviting option. Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, they assert that this bill would state a straightforward rule, adaptable to new technologies.

II. A summary of the principal arguments in opposition to the bill is set out below (i.e. rationales to maintain the best evidence rule) :

1) Fraud: Essentially, the Department of Justice (DOJ) contends that because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures for authenticating documents are necessary to safeguard against fraud. DOJ believes that SB 177 would undermine these provisions by allowing secondary evidence as a primary means of proof.

California Attorneys for Criminal Justice (CACJ) contends that there are some substantive dangers to changing this rule. "In an era where it is increasingly easy to produce a duplicate or an altered duplicate that is difficult to detect, it makes little sense to shift the burden from the proponent of secondary evidence to show that the evidence should be admitted to the opponent of admission of evidence." CACJ claims that in most cases, the best evidence rule is little hindrance to the admission of evidence, but in some cases it does provide a safeguard. They conclude by arguing the danger that evidence will be less carefully scrutinized before admission is particularly great in criminal cases where there is not the broad discovery that exists in civil cases.

Professor Edward Imwinkelried, who teaches Evidence at UC Davis School of Law and is a co-author of several texts on Evidence law, is also opposed to the bill. Prof. Imwinkelried echoes the above-noted concerns raised by the Attorney General and CACJ about how the bill may make it more difficult to detect forgery of documents in criminal cases. Prof. Imwinkelried states that any questioned document examiner would state that it is much easier for him or her to detect forgery when they are provided with the ink or ribbon original, and that the use of a photocopy makes it more difficult to unmask a forgery. By making it even easier to use photocopies, the professor argues that the bill will make it harder to detect attempted fraud on the court.

2) Change not necessary: CACJ opposes the bill, stating that they are unaware of any evidence to suggest that the best evidence rule in existing law is failing to function. CACJ states that the rule and its interpretation is well understood by the courts and attorneys. "Any change of the rule will require time and energy to be spent by the court and litigants on interpreting and applying the new rule when no change is needed."

Prof. Imwinkelried contends that there is little need to revise the current statutory scheme codifying the best evidence rule. He claims that the Law Revision Commission's report "does not cite a single contemporary article arguing that today the best evidence rule is a serious impediment to the search for the truth." The professor argues that as prolific as legal commentators are, "the silence indicates that there is a widespread, modern consensus that the best evidence rule has already been sufficiently liberalized."

Imwinkelried also argues that the claim that the proposed secondary evidence scheme will operate in a simpler, more straightforward fashion than the current provisions is unlikely to prove true. In support of this argument, he notes that the bill fails to define "secondary evidence," leaving attorneys and the courts to "divine by inference that the expression includes, but is not limited to, duplicates... ."

Professor Imwinkelried suggests that the bill would be far more useful if it was amended to: (1) set out relevant definitions at the beginning of the bill; (2) establish rules for the admissibility of duplicates; and (3) establish rules governing the admissibility of oral testimony. He claims that when a judge is presented with a best evidence objection, initially the judge would use the definitions in the first section to classify the proffered evidence. Having done so, the judge could then turn immediately to a section which prescribed the rules governing the admissibility of that classification of evidence.

In conclusion, the opponents of the bill point to several problems with the proposed secondary evidence rule, including: (1) it shifts the burden of proof from the proponent to the opponent of secondary evidence; (2) it does not define what constitutes secondary evidence; (3) it appears to change the burden of appeal from a preponderance of the evidence test to a substantial evidence test; and, (4) it fails to adequately deter fraud.

III. Application to criminal cases:

Proposed Evidence Code Section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. The section would not apply to: a duplicate; a writing that is not closely related to the controlling issues in the action; a copy of a writing in the custody of a public entity; a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

Proposed Penal Code Section 872.5 replaces existing Penal Code Section 872.5, which provides that the best evidence rule shall not apply to preliminary examinations. The proposed section would provide that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

IV. Conclusion:

The Office of Criminal Justice Planning recognizes that this bill is the result of a study and recommendation of the California Law Revision Commission to replace the best evidence rule with a secondary evidence rule that serves the same ends but is more efficient and less costly for litigants and more adaptable to new technologies. OCJP is supportive of this concept. OCJP agrees with the Law Revision Commission that the fraud deterrence as a reason for best evidence rule is no longer valid. Even CACJ, an opponent to this measure agrees that in most cases, the best evidence rule is little hindrance to the admission of evidence. OCJP also agrees that the exceptions to the current best evidence rule has in fact made the rule obsolete. The number of exceptions which are described in this analysis demonstrated just how diluted this rule has become. Contained in this bill is a provision which narrows the application of the use of secondary evidence in a criminal action. It provides that a court shall exclude secondary evidence of a writing if the court determines that the original writings are in the proponent's possession and the proponent has not made the original documents available for inspection. This provision is in recognition of the narrower discovery rules in criminal cases.

Fiscal Analysis

This bill contains no appropriation. This bill does not create a state-mandated local program. The Office of Criminal Justice Planning defers to the Department of Finance for a fiscal recommendation of this measure.

Related Legislation

None known

Support

CA Law Revision Commission
CA Peace Officers' Association
CA Police Chiefs Association,
LA County Bar Association Litigation Section
LA County Municipal Court Judges' Association
Prof. Miguel A. Mendez, Stanford Law School

Opposition

Office of the Attorney General
CA Attorneys for Criminal Justice
Prof. Edward Imwinkelried, UC Davis Law School

Status

- Passed Senate Criminal Procedure Committee (7-0) on 3/18/97
- Passed Senate Judiciary Committee (5-1) on 1/14/98
- Passed Senate Floor (33-2) on 1/22/98
- Passed Assembly Judiciary Committee (13-1) on 6/9/98
- Passed Assembly Floor (56-15) on 6/18/98

Note: 13 of the 15 "no" votes on the Assembly Floor were republican, however, the Assembly Republican Caucus has a support position.

Recommendation

The Office of Criminal Justice Planning recommends that the Governor **SIGN** SB 177.

EXHIBIT B-5

GOVERNOR'S OFFICE OF PLANNING AND RESEARCH

Enrolled Bill Report

Bill Number	*Author*	*As Amended*
SB 177	KOPP	MAY 5, 1997

Subject

EVIDENCE: PROOF OF THE CONTENT OF A WRITING

☒ No Analysis Required --- not within scope of our responsibility.

☐ Author's staff advises this office that this bill is a "spot" bill that will be significantly amended. Further analysis will be completed when language becomes available.

☐ Author's staff advises this office that they will not be pursuing this measure any further. We will continue to monitor and will analyze this bill, if in fact it does move.

☐ Technical amendment --- no change needed in previously submitted analysis.
Approved position and version analysis:

☐ Minor amendment --- previously submitted analysis still valid.
Previously approved position:

Comments:

SB 177 would revise and recast the rules governing the proof of the content of a writing in a civil or criminal action proceeding. This bill does not under the purview of this office, therefore we have **NO RECOMMENDATION** on SB 177.

Jolena Voorhis, Assistant Deputy Director, Legislation
TL

Recommendation

NONE

By	*Date*
	JUNE 22, 1998

Title

PAUL F MINER
DIRECTOR

EXHIBIT B-6

STATE AND CONSUMER SERVICES AGENCY		NO ENROLLED BILL REPORT REQUIRED
DEPARTMENT GENERAL SERVICES	AUTHOR Kopp	BILL NUMBER SB 177

☐ Technical bill. No program or fiscal changes to existing program. No analysis required. No recommendation on signature.

☒ Bill as enrolled no longer within scope of responsibility or program of this department.

BILL SUMMARY:

Existing law sets forth the rules governing the proof of the content of a writing in a civil or criminal proceeding. SB 177 will revise those rules in the state's Evidence and Penal Codes.

The changes made by SB 177 go to the admissibility of certain evidence in civil and criminal proceedings. In a civil or criminal proceeding involving the Department of General Services, we would be represented by the Attorney General's Office. The proposed changes to the evidence rules do not affect the programs or operations of the Department of General Services and, therefore, we have no recommendation on the bill.

Karen Neuwald
Assistant Director-Legislation
Department of General Services
445-3946

Sherry Williams
Legislative Analyst
Department of General Services
327-2268

RECOMMENDATION

NONE Refer to OGJD

DEPARTMENT DIRECTOR	DATE	AGENCY SECRETARY	DATE
Karen Neuwald	6-22-98		6/30/98

EXHIBIT B-7

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

SB 177

THIRD READING

Bill No: SB 177
Author: Kopp (I)
Amended: 5/5/97
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 7-0, 3/18/97
AYES: Vasconcellos, Rainey, Burton, Kopp, McPherson, Schiff, Watson
NOT VOTING: Polanco

SENATE JUDICIARY COMMITTEE: 5-1, 1/13/98
AYES: Burton, Haynes, Lee, O'Connell, Sher
NOES: Wright
NOT VOTING: Calderon, Leslie, Lockyer

SUBJECT: Best Evidence Rule

SOURCE: California Law Revision Commission

DIGEST: This bill would repeal the "best evidence rule" which requires the original of a writing to be offered in evidence to prove the content of the writing, and would replace it with the "secondary evidence rule" which would provide that the content of the writing may be proved by otherwise admissible secondary evidence.

ANALYSIS: Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "Best Evidence Rule."

CONTINUED

This bill would repeal the Best Evidence Rule and replace it with the "secondary evidence rule," providing that the content of a writing may be proved by otherwise admissible secondary evidence unless (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

Existing law provide that the best evidence rule shall not apply at preliminary examinations.

This bill would provide that, at a preliminary examination, the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Rationales for the Best Evidence Rule No Longer Valid

1. Fraud deterrence: The Law Revision Commission believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions." (Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369, 379 (1996).) The Commission's report also notes that, with the advent of new technologies such as scanning and manipulating signatures, it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

2. Minimizing misinterpretation: One of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. The Law Revision Commission Report states that while preventing misinterpretation of writings is an important goal, modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial." (Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369, 381 (1996).)

3. Other ways to safeguard against fraud and misinterpretation: The Law Revision Commission believes that the best evidence rule is not the only

CONTINUED

protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

Costs of the Rule Outweigh Benefits

According to the Law Revision Commission Report, the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend more time and resources hunting down the "original" in order to avoid a best evidence objections.

Under Existing Law, do the Exceptions Swallow the Rule?

There are numerous exceptions and qualifications to the best evidence rule. For example, both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original," meaning a Xerox copy, so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original.

Moreover, the best evidence rule itself contains many other exceptions to the requirements that the original be produced, including:

- Printed representations of computer information and computer programs.
- Printed representations of images stored on video or digital media.
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence.
- Secondary evidence of unavailable writings.
- Secondary evidence of writings an opponent has, but fails to produce as requested.

CONTINUED

- Secondary evidence of collateral writings that would be inexpedient to produce.
- Secondary evidence of writings in the custody of a public entity.
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute.
- Secondary evidence of voluminous writings.
- Copies of writings that were produced at the hearing and made available to the other side.
- Certain official records and certified copies of writings in official custody.
- Photographic copies made as business records.
- Photographic copies of documents lost or destroyed, if properly certified.
- Copies of business records produced in compliance with Sections 1560-1561.

Proponents of the bill contend that, when considering these exceptions, combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Furthermore, they contend that creating any further exceptions to the rule is not an inviting option. Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, they assert that this bill would state a straightforward rule, adaptable to new technologies.

The Proposed Secondary Evidence Rule

The bill would provide that, in addition to an otherwise admissible original, the content of a writing may be proved by otherwise admissible secondary evidence, unless (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

CONTINUED

The bill would preserve existing law governing the admissibility of oral testimony to prove the content of a writing, providing that generally oral testimony is not admissible to prove the content of a writing Likewise, any document still would have to be authenticated before it is admissible.

The Law Revision Commission asserts that, in light of the broad exceptions to the best evidence rule, adoption of the secondary evidence rule will not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just and workable.

Rule in Criminal Cases

Proposed Evidence Code Section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. The section would not apply to (1) a duplicate; (2) a writing that is not closely related to the controlling issues in the action; (3) a copy of a writing in the custody of a public entity; and (4) a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence in the writing by statute.

Secondary Evidence in Preliminary Examination

Proposed Penal Code Section 872.5 replaces existing Penal Code Section 872.5, which provides that the best evidence rule shall not apply to preliminary examinations. The proposed section would provide that, at a preliminary examination, the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Prior Legislation

Chapter 299 of 1965; Chapter 708 of 1977; Chapter 933 of 1983; AB 2897 of 1996 (Bowler: Senate Vote 38-0); AB 1387 of 1996 (Brulte: Senate Vote 36-0).

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 1/14/98)

California Law Revision Commission (source)

CONTINUED

Miguel A. Mendez, Stanford Law Professor
California Peace Officer Association

OPPOSITION: (Verified 1/14/98)

Office of the Attorney General, Department of Justice
California Attorneys for Criminal Justice

ARGUMENTS IN SUPPORT: According to the Law Revision Comments to Evidence Code Section 1500, the best evidence rule was "designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." At the time of its creation, the rule contained ten exceptions which either existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

In its recommendation to repeal the best evidence rule and replace it with the proposed secondary evidence rule, the California Law Revsion Commission maintains that the rationales for the best evidence rule are no longer valid and the costs of the rule outweigh the benefits.

ARGUMENTS IN OPPOSITION: The opponents of the bill to point to several problems with the proposed secondary evidence rule, including (1) it shifts the burden of proof from the proponent to the opponent of secondary evidence; (2) it does not define what constitutes secondary evidence; (3) it appears to change the burden of appeal from a preponderance of the evidence test to a substantial evidence test; and (4) it fails to adequately deter fraud.

Essentially, the State Department of Justice (DOJ) contends that, because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures of authenticating documents as necessary to safeguard against fraud. DOJ believes that this bill would undermine these provisions by allowing secondary evidence as a primary means of proof.

RJG::cm 1/15/98 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** END ****

EXHIBIT B-8

EXHIBIT C-1

SENATE THIRD READING
SB 177 (Kopp)
As Amended May 5, 1997
Majority vote

SENATE VOTE: 33-2

JUDICIARY 13-1

Ayes: Escutia, Alby, Baugh, Figueroa, Honda, Kaloogian, Keeley, Knox, Kuehl, Martinez, McClintock, Ortiz, Shelley

Nays: Morrow

SUMMARY: Repeals the best evidence rule, which requires the original of a writing to be offered in evidence to prove the content of the writing, and replaces it with the secondary evidence rule which would provide that the content of a writing may be proved by otherwise admissible secondary evidence. Specifically, this bill:

1) Repeals the best evidence rule and replaces it with the secondary evidence rule, which provides that the content of a writing may be proved by otherwise admissible secondary evidence unless: a) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or b) admission of the secondary evidence would be unfair.

2) Provides that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

EXISTING LAW provides:

1) Under the law governing the proof of the content of a writing in a civil or criminal action or proceeding, that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "Best Evidence Rule."

2) That the best evidence rule shall not apply at preliminary examinations in criminal cases.

FISCAL EFFECT: Unknown

COMMENTS: In its recommendation to repeal the best evidence rule and replace it with the secondary evidence rule proposed in this bill, the California Law Revision Commission (Commission) states in part:

> The Best Evidence Rule is an anachronism. In yesterday's world of manual copying and limited pretrial discovery, it served as a safeguard against misleading use of secondary evidence. Under contemporary circumstances, in which high quality photocopies are standard and litigants have broad opportunities for pretrial inspection of original documents, the Best Evidence Rule is no longer necessary to protect against unreliable secondary evidence. Because

the rule's cost now outweigh its benefits, the Law Revision Commission recommends that it be repealed.

The Commission believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions." The Commission's report also notes that with the advent of new technologies such as scanning and manipulating signatures it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

One of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. The Commission report states that while preventing misinterpretation of writings is an important goal, modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial." The Commission believes that the best evidence rule is not the only protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

According to the Commission report, the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend time and resources hunting down the "original" in order to avoid a best evidence objection.

The Commission asserts that in light of the broad exceptions to the best evidence rule, adoption of the secondary evidence rule will not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just and workable.

Other proponents of this bill also contend that when considering the many exceptions to the Best Evidence Rule, combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Furthermore, they contend that creating any further exceptions to the rule is not an inviting option. Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, they assert that this bill would state a straightforward rule, adaptable to new technologies.

The opponents of this bill point to several problems with the proposed secondary evidence rule, including: 1) it shifts the burden of proof from the proponent to the opponent of secondary evidence; 2) it does not define what constitutes secondary evidence; 3) it appears to change the burden of appeal from a preponderance of the evidence test to a substantial evidence test; and 4) it fails to adequately deter fraud.

Analysis prepared by: Dan Pone / ajud / (916) 319-2334

EXHIBIT C-2

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

SB 177

UNFINISHED BUSINESS

Bill No: SB 177
Author: Kopp (I)
Amended: 5/5/97
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 7-0, 3/18/97
AYES: Vasconcellos, Rainey, Burton, Kopp, McPherson, Schiff, Watson
NOT VOTING: Polanco

SENATE JUDICIARY COMMITTEE: 5-1, 1/13/98
AYES: Burton, Haynes, Lee, O'Connell, Sher
NOES: Wright
NOT VOTING: Calderon, Leslie, Lockyer

SENATE FLOOR: 33-2, 1/22/98
AYES: Alpert, Ayala, Burton, Costa, Dills, Greene, Hayden, Haynes, Hughes, Hurtt, Johannessen, Johnson, Johnston, Karnette, Kelley, Knight, Kopp, Lee, Lewis, Lockyer, Maddy, McPherson, Monteith, O'Connell, Peace, Polanco, Rainey, Rosenthal, Schiff, Sher, Solis, Thompson, Watson
NOES: Mountjoy, Wright
NOT VOTING: Brulte, Calderon, Craven, Leslie, Vasconcellos

ASSEMBLY FLOOR: >, > - See last page for vote

SUBJECT: Best Evidence Rule

SOURCE: California Law Revision Commission

CONTINUED

DIGEST: This bill would repeal the "best evidence rule" which requires the original of a writing to be offered in evidence to prove the content of the writing, and would replace it with the "secondary evidence rule" which would provide that the content of the writing may be proved by otherwise admissible secondary evidence.

ANALYSIS: Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "Best Evidence Rule."

This bill would repeal the Best Evidence Rule and replace it with the "secondary evidence rule," providing that the content of a writing may be proved by otherwise admissible secondary evidence unless (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

Existing law provide that the best evidence rule shall not apply at preliminary examinations.

This bill would provide that, at a preliminary examination, the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Rationales for the Best Evidence Rule No Longer Valid

1. Fraud deterrence: The Law Revision Commission believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions." (Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369, 379 (1996).) The Commission's report also notes that, with the advent of new technologies such as scanning and manipulating signatures, it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

CONTINUED

2. Minimizing misinterpretation: One of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. The Law Revision Commission Report states that while preventing misinterpretation of writings is an important goal, modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial." (Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369, 381 (1996).)

3. Other ways to safeguard against fraud and misinterpretation: The Law Revision Commission believes that the best evidence rule is not the only protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

Costs of the Rule Outweigh Benefits

According to the Law Revision Commission Report, the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend more time and resources hunting down the "original" in order to avoid a best evidence objections.

Under Existing Law, do the Exceptions Swallow the Rule?

There are numerous exceptions and qualifications to the best evidence rule. For example, both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original," meaning a Xerox copy, so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original.

Moreover, the best evidence rule itself contains many other exceptions to the requirements that the original be produced, including:

CONTINUED

- Printed representations of computer information and computer programs.
- Printed representations of images stored on video or digital media.
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence.
- Secondary evidence of unavailable writings.
- Secondary evidence of writings an opponent has, but fails to produce as requested.
- Secondary evidence of collateral writings that would be inexpedient to produce.
- Secondary evidence of writings in the custody of a public entity.
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute.
- Secondary evidence of voluminous writings.
- Copies of writings that were produced at the hearing and made available to the other side.
- Certain official records and certified copies of writings in official custody.
- Photographic copies made as business records.
- Photographic copies of documents lost or destroyed, if properly certified.
- Copies of business records produced in compliance with Sections 1560-1561.

Proponents of the bill contend that, when considering these exceptions, combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Furthermore, they contend that creating any further

CONTINUED

exceptions to the rule is not an inviting option. Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, they assert that this bill would state a straightforward rule, adaptable to new technologies.

The Proposed Secondary Evidence Rule

The bill would provide that, in addition to an otherwise admissible original, the content of a writing may be proved by otherwise admissible secondary evidence, unless (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

The bill would preserve existing law governing the admissibility of oral testimony to prove the content of a writing, providing that generally oral testimony is not admissible to prove the content of a writing Likewise, any document still would have to be authenticated before it is admissible.

The Law Revision Commission asserts that, in light of the broad exceptions to the best evidence rule, adoption of the secondary evidence rule will not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just and workable.

Rule in Criminal Cases

Proposed Evidence Code Section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. The section would not apply to (1) a duplicate; (2) a writing that is not closely related to the controlling issues in the action; (3) a copy of a writing in the custody of a public entity; and (4) a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence in the writing by statute.

Secondary Evidence in Preliminary Examination

Proposed Penal Code Section 872.5 replaces existing Penal Code Section 872.5, which provides that the best evidence rule shall not apply to preliminary examinations. The proposed section would provide that, at a preliminary examination, the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

CONTINUED

Prior Legislation

Chapter 299 of 1965; Chapter 708 of 1977; Chapter 933 of 1983; AB 2897 of 1996 (Bowler: Senate Vote 38-0); AB 1387 of 1996 (Brulte: Senate Vote 36-0).

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 1/14/98)

California Law Revision Commission (source)
Miguel A. Mendez, Stanford Law Professor
California Peace Officer Association

OPPOSITION: (Verified 1/14/98)

Office of the Attorney General, Department of Justice
California Attorneys for Criminal Justice

ARGUMENTS IN SUPPORT: According to the Law Revision Comments to Evidence Code Section 1500, the best evidence rule was "designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." At the time of its creation, the rule contained ten exceptions which wither existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

In its recommendation to repeal the best evidence rule and replace it with the proposed secondary evidence rule, the California Law Revsion Commission maintains that the rationales for the best evidence rule are no longer valid and the costs of the rule outweigh the benefits.

ARGUMENTS IN OPPOSITION: The opponents of the bill to point to several problems with the proposed secondary evidence rule, including (1) it shifts the burden of proof from the proponent to the opponent of secondary evidence; (2) it does not define what constitutes secondary evidence; (3) it appears to change the burden of appeal from a preponderance of the evidence test to a substantial evidence test; and (4) it fails to adequately deter fraud.

CONTINUED

Essentially, the State Department of Justice (DOJ) contends that, because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures of authenticating documents as necessary to safeguard against fraud. DOJ believes that this bill would undermine these provisions by allowing secondary evidence as a primary means of proof.

ASSEMBLY FLOOR:

RJG::cm 6/9/98 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** **END** ****

EXHIBIT C-3

SENATE FLOOR ANALYSES WORKSHEET CONSULTANT: BJS

THIRD READING / ~~CONSENT~~ / ~~(DO AHEAD)~~

Bill No.: AB 177
Author: ~~5/5/97~~ Kopp (I)
Amended: 5/5/97
Vote Required:: 2/1

SEN. JUD COM.: Vote 5-1, Date 1/13/98
SEN. APPROP. COM.: Vote_____, Date_____ / 28.8 / ~~NONFISCAL~~
SEN. FLOOR: Vote_____, Date_____ / ASSY FLOOR: Vote_____, Date_____

SUBJECT: Best Evidence Rule
SOURCE: Calif. Law Revision Commission

DIGEST: A

ANALYSIS: B1, B2, B3, B4, B5
FISCAL EFFECT: Appropriation: NO Fiscal Committee: NO Local: NO
SUPPORT: Verification Date 1/14
#445-0503 DAM
Calif. Law ~~Revision~~ Revision Comm (Sponsor)
#1

OPPOSITION: Verification Date 1/14
#2

ARGUMENTS IN SUPPORT: C1, C2

ARGUMENTS IN OPPOSITION: D1

EXHIBIT C-4

SENATE RULES COMMITTEE SB 177
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

THIRD READING

Bill No: SB 177
Author: Kopp (I)
Amended: 5/5/97
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 7-0, 3/18/97
AYES: Vasconcellos, Rainey, Burton, Kopp, McPherson, Schiff, Watson
NOT VOTING: Polanco

SENATE JUDICIARY COMMITTEE: 5-1, 1/13/98
AYES: Burton, Haynes, Lee, O'Connell, Sher
NOES: Wright
NOT VOTING: Calderon, Leslie, Lockyer

SUBJECT: Best Evidence Rule

SOURCE: California Law Revision Commission

DIGEST: This bill would repeal the "best evidence rule" which requires the original of a writing to be offered in evidence to prove the content of the writing, and would replace it with the "secondary evidence rule" which would provide that the content of the writing may be proved by otherwise admissible secondary evidence.

ANALYSIS: Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "Best Evidence Rule."

CONTINUED

This bill would repeal the Best Evidence Rule and replace it with the "secondary evidence rule," providing that the content of a writing may be proved by otherwise admissible secondary evidence unless (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

Existing law provide that the best evidence rule shall not apply at preliminary examinations.

This bill would provide that, at a preliminary examination, the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Rationales for the Best Evidence Rule No Longer Valid

1. Fraud deterrence: The Law Revision Commission believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions." (Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369, 379 (1996).) The Commission's report also notes that, with the advent of new technologies such as scanning and manipulating signatures, it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

2. Minimizing misinterpretation: One of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. The Law Revision Commission Report states that while preventing misinterpretation of writings is an important goal, modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial." (Best Evidence Rule, 26 Cal. L. Revision Comm'n Reports 369, 381 (1996).)

3. Other ways to safeguard against fraud and misinterpretation: The Law Revision Commission believes that the best evidence rule is not the only

CONTINUED

protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

Costs of the Rule Outweigh Benefits

According to the Law Revision Commission Report, the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend more time and resources hunting down the "original" in order to avoid a best evidence objections.

Under Existing Law, do the Exceptions Swallow the Rule?

There are numerous exceptions and qualifications to the best evidence rule. For example, both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original," meaning a Xerox copy, so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original.

Moreover, the best evidence rule itself contains many other exceptions to the requirements that the original be produced, including:

- Printed representations of computer information and computer programs.
- Printed representations of images stored on video or digital media.
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence.
- Secondary evidence of unavailable writings.
- Secondary evidence of writings an opponent has, but fails to produce as requested.

CONTINUED

- Secondary evidence of collateral writings that would be inexpedient to produce.
- Secondary evidence of writings in the custody of a public entity.
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute.
- Secondary evidence of voluminous writings.
- Copies of writings that were produced at the hearing and made available to the other side.
- Certain official records and certified copies of writings in official custody.
- Photographic copies made as business records.
- Photographic copies of documents lost or destroyed, if properly certified.
- Copies of business records produced in compliance with Sections 1560-1561.

Proponents of the bill contend that, when considering these exceptions, combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Furthermore, they contend that creating any further exceptions to the rule is not an inviting option. Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, they assert that this bill would state a straightforward rule, adaptable to new technologies.

The Proposed Secondary Evidence Rule

The bill would provide that, in addition to an otherwise admissible original, the content of a writing may be proved by otherwise admissible secondary evidence, unless (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

CONTINUED

The bill would preserve existing law governing the admissibility of oral testimony to prove the content of a writing, providing that generally oral testimony is not admissible to prove the content of a writing Likewise, any document still would have to be authenticated before it is admissible.

The Law Revision Commission asserts that, in light of the broad exceptions to the best evidence rule, adoption of the secondary evidence rule will not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just and workable.

Rule in Criminal Cases

Proposed Evidence Code Section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. The section would not apply to (1) a duplicate; (2) a writing that is not closely related to the controlling issues in the action; (3) a copy of a writing in the custody of a public entity; and (4) a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence in the writing by statute.

Secondary Evidence in Preliminary Examination

Proposed Penal Code Section 872.5 replaces existing Penal Code Section 872.5, which provides that the best evidence rule shall not apply to preliminary examinations. The proposed section would provide that, at a preliminary examination, the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Prior Legislation

Chapter 299 of 1965; Chapter 708 of 1977; Chapter 933 of 1983; AB 2897 of 1996 (Bowler: Senate Vote 38-0); AB 1387 of 1996 (Brulte: Senate Vote 36-0).

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 1/14/98)

California Law Revision Commission (source)

CONTINUED

Miguel A. Mendez, Stanford Law Professor
California Peace Officer Association

OPPOSITION: (Verified 1/14/98)

Office of the Attorney General, Department of Justice
California Attorneys for Criminal Justice

ARGUMENTS IN SUPPORT: According to the Law Revision Comments to Evidence Code Section 1500, the best evidence rule was "designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." At the time of its creation, the rule contained ten exceptions which wither existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

In its recommendation to repeal the best evidence rule and replace it with the proposed secondary evidence rule, the California Law Revsion Commission maintains that the rationales for the best evidence rule are no longer valid and the costs of the rule outweigh the benefits.

ARGUMENTS IN OPPOSITION: The opponents of the bill to point to several problems with the proposed secondary evidence rule, including (1) it shifts the burden of proof from the proponent to the opponent of secondary evidence; (2) it does not define what constitutes secondary evidence; (3) it appears to change the burden of appeal from a preponderance of the evidence test to a substantial evidence test; and (4) it fails to adequately deter fraud.

Essentially, the State Department of Justice (DOJ) contends that, because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures of authenticating documents as necessary to safeguard against fraud. DOJ believes that this bill would undermine these provisions by allowing secondary evidence as a primary means of proof.

RJG::cm 1/15/98 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** END ****

EXHIBIT C-5

SENATE JUDICIARY COMMITTEE
John L. Burton, Chairman
1997-98 Regular Session

SB 177	S
Senator Kopp	B
As Amended May 5, 1997	
Hearing Date: January 13, 1998	1
Evidence Code	7
JMR:cjt	7

SUBJECT

Best Evidence Rule

DESCRIPTION

This bill would repeal the "best evidence rule" which requires the original of a writing to be offered in evidence to prove the content of the writing, and would replace it with the "secondary evidence rule" which would provide that the content of a writing may be proved by otherwise admissible secondary evidence.

BACKGROUND

The best evidence rule was created in 1965 (Chapter 299) and took effect on January 1, 1967. The best evidence rule was adopted upon a recommendation from the California Law Revision Commission and was adapted from Code of Civil Procedure sections existing at that time. The best evidence rule is set forth in Evidence Code Section 1500 and provides:

> Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

According to the Law Revision Comments to Evidence Code Section 1500, the best evidence rule was "designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." At the time of its creation, the rule contained ten (10) exceptions which either existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

(more)

CHANGES TO EXISTING LAW

Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "Best Evidence Rule." (Evidence Code §1500.)

This bill would repeal the Best Evidence Rule and replace it with the "secondary evidence rule," providing that the content of a writing may be proved by otherwise admissible secondary evidence unless: (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

Existing law provide that the best evidence rule shall not apply at preliminary examinations. (Penal Code Section 872.5.)

This bill would provides that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

COMMENT

1. Purpose of the bill

In its recommendation to repeal the best evidence rule and replace it with the proposed secondary evidence rule, the California Law Revision Commission maintains that the rationales for the best evidence rule are no longer valid and the costs of the rule outweigh the benefits.

a. Rationales for the best evidence rule no longer valid

1) Fraud deterrence: The Law Revision Commission believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions." (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 379 (1996).) The Commission's report also notes that with the advent of new technologies such as scanning and manipulating signatures it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

2) Minimizing misinterpretation: One of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. The Law Revision Commission Report states that while

preventing misinterpretation of writings is an important goal, modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial." (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 381 (1996).)

3) Other ways to safeguard against fraud and misinterpretation:
The Law Revision Commission believes that the best evidence rule is not the only protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

B. Costs of the rule outweigh benefits

According to the Law Revision Commission Report the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend time and resources hunting down the "original" in order to avoid a best evidence objection.

2. Under existing law, do the exceptions swallow the rule?

There are numerous exceptions and qualifications to the best evidence rule. For example, both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original," meaning a Xerox copy, so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original. (Evidence Code § 260; Federal Rule of Evidence 1001(4).)

Moreover, the best evidence rule itself contains many other exceptions to the requirement that the original be produced, including:

- Printed representations of computer information and computer programs. (Section 1500.5.)
- Printed representations of images stored on video or digital media. (Section 1500.6.)
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence. (Sections 1501, 1505.)
- Secondary evidence of unavailable writings. (Sections 1502, 1505.)

- Secondary evidence of writings an opponent has, but fails to produce as requested. (Sections 1503(a), 1505.)
- Secondary evidence of collateral writings that would be inexpedient to produce. (Sections 1504, 1505.)
- Secondary evidence of writings in the custody of a public entity. (Sections 1506, 1508.)
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute. (Sections 1507, 1508.)
- Secondary evidence of voluminous writings. (Section 1509.)
- Copies of writings that were produced at the hearing and made available to the other side. (Section 1510.)
- Certain official records and certified copies of writings in official custody. (Sections 1530-1532.)
- Photographic copies made as business records. (Section 1550.)
- Photographic copies of documents lost or destroyed, if properly certified. (Section 1551.)
- Copies of business records produced in compliance with Sections 1560-1561. (Sections 1562, 1564, 1566.)

Proponents of the bill contend that when considering these exceptions combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Furthermore, they contend that creating any further exceptions to the rule is not an inviting option. Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, they assert that this bill would state a straightforward rule, adaptable to new technologies.

3. <u>The proposed secondary evidence rule</u>

The bill would provide that, in addition to an otherwise admissible original, the content of a writing may be proved by otherwise admissible secondary evidence, unless: (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

The bill would preserve existing law governing the admissibility of oral testimony to prove the content of a writing, providing that generally oral testimony is not admissible to prove the content of a writing. Likewise, any document still would have to be authenticated before it is admissible.

The Law Revision Commission asserts that in light of the broad exceptions to the best evidence rule, adoption of the secondary evidence rule will not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just and workable.

a. Rule in criminal cases

Proposed Evidence Code Section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. The section would not apply to: a duplicate; a writing that is not closely related to the controlling issues in the action; a copy of a writing in the custody of a public entity; a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

b. Secondary evidence in preliminary examination

Proposed Penal Code Section 872.5 replaces existing Penal Code Section 872.5, which provides that the best evidence rule shall not apply to preliminary examinations. The proposed section would provide that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

4. Opposition

The opponents of the bill point to several problems with the proposed secondary evidence rule, including: (1) it shifts the burden of proof from the proponent to the opponent of secondary evidence; (2) it does not define what constitutes secondary evidence; (3) it appears to change the burden of appeal from a preponderance of the evidence test to a substantial evidence test; and, (4) it fails to adequately deter fraud.

Essentially, the Department of Justice (DOJ) contends that because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures for authenticating documents are necessary to safeguard against fraud. DOJ believes that SB 177 would undermine these provisions by allowing secondary evidence as a primary means of proof.

Support: Miguel A. Mèndez, Stanford Law Professor

Opposition: Office of the Attorney General, Department of Justice
California Attorneys for Criminal Justice
~~Municipal Court Judges' Ass., Los Angeles County (Section 6 only)~~

HISTORY

Source: California Law Revision Commission

Related Pending Legislation: None known

Prior Legislation: Ch. 299, Stats. 1965; Ch. 708, Stats. 1977; Ch. 933, Stats. 1983; AB 2897 (Bowler) Ch. 345, Stats. 1996; AB 1387 (Brulte) Ch. 642, Stats. 1996 L 7/11/97 38-0 L 8/8/96 36-0

Prior Vote: Senate Public Safety Committee (7-0)

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EXHIBIT C-6

SENATE COMMITTEE ON CRIMINAL PROCEDURE

Senator John Vasconcellos, Chair
1997-98 Regular Session

S B 1 7 7

SB 177 (Kopp)
As introduced
Hearing date: March 18, 1997
Evidence Code; Penal Code
MK:js

BEST EVIDENCE RULE

HISTORY

Source: California Law Revision Commission

Prior Legislation: Chapter 299, Stats. 1965
Chapter 708, Stats. 1977
Chapter 933, Stats. 1983
AB 2897 (Bowler) Chapter 345, Stats. 1996
AB 1387 (Brulte) Chapter 642, Stats. 1996

Support: Miguel A. Méndez, Stanford Law Professor

Opposition: California Attorneys for Criminal Justice (need further time to study)

KEY ISSUE

SHOULD THE "BEST EVIDENCE RULE" BE REPEALED AND REPLACED WITH A NEW RULE TO BE KNOWN AS THE "SECONDARY EVIDENCE" RULE?

PURPOSE

Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "best evidence rule." (Evidence Code section 1500)

(More)

Existing law specifies exceptions to the best evidence rule including exceptions for computer information; a printed representation of image stored on video or digital media to prove existence and content of image; a copy of lost or destroyed writing; a copy of writing not otherwise reasonably procurable; a copy of writing not produced by opponent; a copy of writing not closely related to issues; secondary evidence other than a copy; a copy of a writing in custody of public entity; a copy of recorded writing; numerous accounts or writings; a copy of writing produced at hearing and available for inspection; and a duplicate of a writing; certain official records and certified copies of writings in official custody; photographic copies made as business records; photographic copies of documents lost or destroyed if properly certified; copies of business records produced in compliance with specified statutes. (Evidence Code sections 1500.5 et seq., sections 1530-1532, 15550, 1551, 1562, 1564, 1566)

This bill repeals the existing best evidence rule and replaces it with revised rules governing the proof of the content of a writing in a civil or criminal action which is to be known as the "secondary evidence rule".

Existing law provides that the best evidence rule shall not apply at preliminary examinations. (Penal Code section 872.5)

This bill provides that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

The purpose of this bill is to repeal the "best evidence rule" and replace it with the "secondary evidence rule".

COMMENTS

1. Need for the Bill

In its recommendation to repeal the best evidence rule and replace it with the secondary evidence rule proposed in this bill, the California Law Revision Commission states in part:

> The Best Evidence Rule is an anachronism. In yesterday's world of manual copying and limited pretrial discovery, it served as a safeguard against misleading use of secondary evidence. Under contemporary circumstances, in which high quality photocopies are standard and litigants have broad opportunities for pretrial inspection of original documents, the Best Evidence Rule is no longer necessary to protect against unreliable secondary evidence. Because the rule's cost now

outweigh its benefits, the Law Revision Commission recommends that it be repealed.

2. The Best Evidence Rule

According to the Law Revision Comments to Evidence Code section 1500 the best evidence rule "is designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available."

The best evidence rule was created in 1965 (Chapter 299) and took effect on January 1, 1967. The best evidence rule was adopted upon a recommendation from the California Law Revision Commission and was adapted from Code of Civil Procedure sections existing at that time. At the time of its creation the rule contained 10 exceptions which either existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

The Evidence Code now contains many exceptions to the best evidence rule including:

- Printed representations of computer information and computer programs. (section 1500.5)
- Printed representations of images stored on video or digital media. (section 1500.6)
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence. (sections 1501, 1505)
- Secondary evidence of unavailable writings. (sections 1502, 1505)
- Secondary evidence of writings an opponent has, but fails to produce as requested. (sections 1503(a), 1505)
- Secondary evidence of collateral writings that would be in expedient to produce. (sections 1504, 1505)
- Secondary evidence of writings in the custody of a public entity. (sections 1506, 1508)
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute. (sections 1507, 1508)
- Secondary evidence of voluminous writings. (section 1509)
- Copies of writings that were produced at the hearing and made available to the other side. (section 1510)
- Certain official records and certified copies of writings in official custody. (sections 1530-1532)
- Photographic copies made as business records. (section 1550)
- Photographic copies of documents lost or destroyed, if properly certified. (section 1551)
- Copies of business records produced in compliance with sections 1560-1561. (sections 1562, 1564, 1566)

3. Reasons for Repeal of the Best Evidence Rule

a. Rationale for best evidence rule no longer valid.

1) Fraud deterrence

The Law Revision Commission does believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions."[1] The Law Revision Commission report also notes that with the advent of new technologies such as scanning and manipulating signatures it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

2) Minimizing misinterpretation

As noted above in section 2, one of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. According to the Law Revision Commission this rationale is based on the fact that in litigation the exact words of the writing are often especially important, that an original document may provide clues to interpretation and that the secondary evidence may not faithfully reflect the original.

The Law Revision Commission Report states that while preventing misinterpretation of writings is an important goal modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial."[2]

3) Other ways to safeguard against fraud and misinterpretation

The Law Revision Commission believes that the Best Evidence Rule is not the only protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

---

[1] *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 379 (1996)
[2] *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 381 (1996)

b. Cost of the best evidence rule

According to the Law Revision Commission Report the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend time and resources hunting down the "original" in order to avoid a best evidence rejection.

4. Secondary Evidence Rule

The Law Revision Commission proposes replacing the best evidence rule with the secondary evidence rule. The Commission asserts that the secondary evidence rule will not dramatically alter the admissibility of secondary evidence to prove content but will be an easier rule for the courts and litigants to apply. No other jurisdiction has adopted a secondary evidence rule so there is no basis for which to evaluate its affect by experience.

a. Original still admissible to prove content

Proposed Evidence Code section 1520 states "[t]he content of a writing may be proved by an otherwise admissible original." This continues in part the existing 1500 by permitting proof of the content of a writing by an original of the writing.

b. Secondary evidence rule

Proposed Evidence Code section 1521 is the statement of the "secondary evidence rule." It states the general rule that the content of a writing may be proved by otherwise admissible evidence and then provides the circumstances under which the court shall exclude the evidence. These are: a genuine dispute exists concerning the material terms of the writing and justice requires the exclusion; or admission of the secondary evidence would be unfair.

This section also explicitly establishes that the proposed section 1523 determines when oral testimony is admissible to prove a writing.

Finally, this section provides that any document must still be authenticated before it is admissible.

c. Rule in criminal cases

Proposed Evidence Code section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence

on making the original reasonably available for inspection if the proponent has it. The section does not apply to: a duplicate; a writing that is not closely related to the controlling issues in the action; a copy of a writing in the custody of a public entity; a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

d. Oral testimony of content of writing

Proposed Evidence Code section 1523 preserves the existing law governing the admissibility of oral testimony to prove the content of a writing.

e. Computer printout

Proposed Evidence Code section 1552 continues existing section 1500.5 (c) and (d) without substantive change.

f. Printout of images stored on video or digital media

Proposed Evidence Code section 1553 continues a portion of existing section 1500.6 without substantive change.

g. Secondary evidence in preliminary examination

Proposed Penal Code section 872.5 replaces existing Penal Code section 872.5 which provided that the best evidence rule shall not apply to preliminary examinations. The proposed section provides that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

h. Photographic records of exhibits

In this bill Penal Code section 1417.7 is amended to reflect the repeal of the best evidence rule.

5. Uncodified Section

An uncodified section in this bill provides that the proposed changes in this bill would take effect on January 1, 1998. It also provides that nothing in the act applies to an action or proceeding commenced before the effective day or invalidates any evidentiary ruling made prior to the effective date.

6. Law Revision Commission Comments

The Law Revision Commission Comments to the proposed sections, while not codified, will be published as comments to the new sections in annotated codes.

7. Proponents/Opponents

The groups representing those interested in evidentiary issues are still in the process of reviewing and studying the proposals in this bill and thus have not taken final positions on this legislation.

8. Double-Referral for This Bill

SB 177 was referred to both this Committee and the Senate Committee on Judiciary. If it is approved by this Committee, it will be rereferred to the second policy committee.

****

EXHIBIT C-7

EXHIBIT D-1

Judiciary Committee **Support**

SB 177 (KOPP)
EVIDENCE: PROOF OF THE CONTENT OF A WRITING.

Version: 5/5/97 Last Amended
Vote: Majority
Vice-Chair: Bill Morrow
Tax or Fee Increase: No

Support Would replace the best evidence rule and its many exceptions with a secondary evidence rule that would serve the same ends of deterring fraud and be more straightforward, efficient and adaptable to new technologies.

Policy Question

Should existing law requiring the original of a writing to be offered to prove the content of a writing in civil or criminal proceeding be replaced with a rule to provide that such content of a writing may be proved by otherwise admissible evidence, unless a genuine dispute exists concerning material terms of the writing?

Summary

This bill repeals the "Best Evidence Rule", which requires the original of a writing to be offered in evidence to prove the content of the writing, and replaces it with the "secondary evidence rule" to provide that the content of the writing may be proved by otherwise admissible secondary evidence. The Best Evidence Rule of Evidence Code Section 1500, which includes several subsequent enumerated Evidence Code Section exceptions, governs the proof of the content of a writing in a civil or criminal action to provide that "[e] xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This bill would repeal such rule and replace it with the "secondary evidence rule," providing that the content of a writing may be proved by otherwise admissible secondary evidence unless (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair. The bill would further provide that, at a preliminary examination, the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence. (Note that existing law provides that the Best Evidence Rule does not apply at preliminary examinations.)

Senate Republican Floor Votes (33-2) 1/22/98 PASS
Ayes: Haynes, Hurtt, Johannessen, Johnson,Kelley, Knight, Lewis, Maddy, Mc Pherson, Monteith, Rainey
Noes: Mountjoy, Wright
Abs. / NV: Brulte, Craven, Leslie

Assembly Republican Judiciary Votes (0-0) 6/9/98
Ayes: None
Noes: None
Abs. / NV: None

Assembly Republican Votes (0-0) 1/1/98
Ayes: None
Noes: None
Abs. / NV: None

Assembly Republican Votes (0-0) 1/1/98
Ayes: None
Noes: None
Abs. / NV: None

Support

California Law Revision Commission (Sponsor); Professor of Law Miguel Mendez at Stanford University; Los Angeles County Bar Association Litigation Section; Los Angeles Municipal Court Association; California Peace Officers Association and California Police Chiefs Association..

Opposition

California Attorney General; California Attorneys for Criminal Justice.

Arguments In Support of the Bill

1. This bill replaces the Best Evidence Rule and its many exceptions with a doctrine that would serve the same end and is more straightforward, efficient, just and adaptable to new technologies.
2. The Best Evidence Rule does not adequately deter fraud as a litigant may fabricate secondary evidence and manufacture an excuse that satisfies one of the rule's exceptions.
3. The Best Evidence Rule does not adequately deter fraud due to the advent of new technologies such as scanning and manipulating signatures to easily permit an unscrupulous litigant to create false evidence and introduce it as original.
4. Modern discovery procedure undermines the justification for the Best Evidence Rule because litigants are now able to examine original documents in discovery and can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of

the trial.

5. Since a party is motivated to present the most convincing evidence to support his or her case, a party would generally otherwise not use secondary evidence that it is without reasonable explanation that would likely discount its probative value.
6. The cost in time and money outweigh the benefits of the Best Evidence Rule where the rule: 1) Causes a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original; 2) Results in the exclusion of reliable evidence and leads to costly appeals; and 3) Adds to the cost of litigation by causing a litigant to expend time and resources hunting down the "original" in order to avoid a best evidence objection.
7. This bill states a straightforward rule, adaptable to new technologies instead of continuing a legal doctrine in which the exceptions are swallowing the rule. The numerous existing exceptions to the Best Evidence Rule, include the following alternate proof: 1) Duplicate (Xerox copy) original authenticated as a correct copy (Evidence Code Section 260 and Federal Rule of Evidence 1001 (4)); 2) Printed representations of computer information; 3) Printed representations of images stored on video or digital media; 4) Secondary evidence of writings that were unintentionally lost or destroyed; 5) Secondary evidence of unavailable writings; 6) Secondary evidence of writings an opponent has, but fails to produce as requested; 7) Secondary evidence of collateral writings that would be inexpedient to produce; 8) Secondary evidence of writings in the custody of a public entity; 9) Secondary evidence of writings recorded in public records, if the record or certified copy is made evidence of the writing by statute; 10) Secondary evidence of voluminous writings; 11) Copies of writings that were produced at the hearing and made available to the other side; 12) Specified official records and certified copies of writings in official custody; 13) Photographic copies made as business records; 14) Photographic copies of documents lost or destroyed if properly certified; and 15) Copies of business records produced in compliance with Evidence Code Sections 1560 – 1561.
8. The use of secondary evidence would preserve existing restrictions governing the admissibility of oral testimony to prove the content of a writing and maintain the requirement that any such document would have to be authenticated before it is admissible.

Arguments In Opposition to the Bill

1. The California Department of Justice contends that reciprocal discovery is not working effectively in civil or criminal forums and this bill would further undermine it by allowing secondary evidence as a primary means of proof, citing the current safeguards against fraud that include the Best Evidence Rule, foundational requirements for secondary evidence of writing and existing civil procedures to authenticate documents as otherwise being adversely affected. **However**, the Best Evidence Rule was established before pretrial discovery and the foundational requirements for secondary evidence, including their certification, are generally maintained to safeguard against fraud
2. The Best Evidence Rule is necessary to avoid the current easy manipulation or manufacture of false evidence. **However**, now it is not necessarily more difficult to manipulate or manufacture false evidence from an original as it is easier to make a document that looks like an original through scanning and manipulating signatures by means of new technologies.
3. The party opposing introduction of secondary evidence would have to justify exclusion of the evidence shifting the burden of proof from the proponent of such evidence. **However** according to the California Law Revision Commission, the shift is justified because the Best Evidence Rule excludes evidence infrequently and those instances do not justify the cumulative burden that the rule imposes in other cases. This bill would assist the legal system to be more efficient and less costly.
4. The bill's approach seems less clear than the Best Evidence Rule and does not adequately define what constitutes secondary evidence. **However**, the secondary evidence rule is based on a standard already in use in California and federal law for admission of duplicates. Case law interpreting that standard and the California Law Revisions published "Comments" would provide further necessary guidance.
5. The bill appears to change the standard of the burden of appeal from a preponderance of the evidence test to a substantial evidence test. **However**, the standard of review under the secondary evidence rule should not change, because the exceptions to it are mandatory, not discretionary. **A provision specifying no change in the standard of review on appeal could be added to the bill if necessary to alleviate any serious concern.**
6. The secondary evidence rule of this bill would fail to adequately deter fraud in not providing enough protection against misleading use of secondary evidence. **However**, the secondary evidence rule includes carefully considered safeguards. Parties have strong incentive to use convincing evidence. If one party uses secondary evidence instead of an original, the other party can argue that to the jury or introduce the original and point out

discrepancies to destroy the first party's credibility.

7. California law should stay in conformity with federal law. **However**, conformity does not exist now and the California State Legislature should change the law when the time is ripe for reform, not when the federal government gets around to taking action.
8. To the extent that the Best Evidence Rule works now, why change it? **However**, problems relating to new technology are starting to surface and one example of recently addressing them was enactment of Evidence Code Section 1500.6 to deal with images on video or digital media. The concern about efficiency and cost of the current legal system procedure is deep and this reform would help to address it.

Fiscal Effect

Unknown.

Comments

1. The Best Evidence Rule was crafted in 1965 to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings, if available. Ten exceptions were also recognized at law to the Best Evidence Rule when placed into statute. Additional exceptions have been added in statute since the 1965 enactment.
2. The Legislature has generally directed the California Law Revision Commission to study such evidentiary procedure. The bill is based upon their study and recommendations to replace the best evidence rule with a secondary evidence rule that serves the same ends but is more efficient and less costly for litigants and more adaptable to new technologies.
3. Proposed Evidence Code Section 1522 narrows application of the use of secondary evidence to situations where the original writings are reasonably available for inspection if the proponent has the original documents. This provision is in recognition of the narrower discovery rules in criminal cases. Note that obtaining original writings in discovery for criminal proceedings was a concern of the state Department of Justice.

Policy Consultant: Mark Redmond 6/4/98
Fiscal Consultant:

EXHIBIT D-2

EXHIBIT E-1

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Barbara Gaal
(415) 494-1335
650-494-1827

Best Evidence Rule

November 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Best Evidence Rule

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Best Evidence Rule,* 26 Cal. L. Revision Comm'n Reports 369 (1996).

STATE OF CALIFORNIA PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
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November 15, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

The Best Evidence Rule (Evidence Code Section 1500) requires that the content of a writing be proven by introducing the original. This recommendation calls for repeal of the Best Evidence Rule and its exceptions, and adoption of a new rule known as the "Secondary Evidence Rule." The new rule would make secondary evidence (other than oral testimony) admissible to prove the content of a writing, but require courts to exclude such evidence if (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.

The Best Evidence Rule is unnecessary in a system with broad pretrial discovery. Its intended functions are to guard against fraud and prevent misinterpretation of writings. In civil cases, those functions are satisfactorily served by existing pretrial opportunities to inspect original documents, coupled with the proposed Secondary Evidence Rule and the normal motivation of the parties to present convincing evidence. In criminal cases, discovery is narrower, so the Secondary Evidence Rule would incorporate a limited exception to address that difference.

Because the Best Evidence Rule has many exceptions, most secondary evidence is already admissible to prove the content of a writing. Adoption of the Secondary Evidence Rule would, however, simplify the law, avoid difficulties in interpretation, and

reduce injustice and waste of resources, including scarce judicial resources.

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

BEST EVIDENCE RULE

INTRODUCTION

The Best Evidence Rule requires that the content of a writing be proven by introducing the original. The rule developed in the eighteenth century, when pretrial discovery was practically nonexistent and manual copying was the only means of reproducing documents.[1] Commentators questioned the rule and its many exceptions in the 1960s when the California Law Revision Commission developed the Evidence Code, but there were still persuasive justifications for the rule and it was codified in California as Evidence Code Section 1500 and in the Federal Rules of Evidence as Rule 1002.

In the last three decades, broad pretrial discovery has become routine, particularly in civil cases. Technological developments such as the dramatic rise in use of facsimile transmission and electronic communications pose new complications in applying the Best Evidence Rule and its exceptions. The rationale for the rule no longer withstands scrutiny. A simpler doctrine, making secondary evidence other than oral testimony generally admissible to prove the content of a writing, provides sufficient protection in civil cases and, with slight modification, in criminal cases. Because the Best Evidence Rule has broad exceptions, adoption of the new doctrine would not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just, and workable.

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1. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California,* 9 U.C. Davis L. Rev. 257, 258 (1976); *see also* Cleary & Strong, *The Best Evidence Rule: An Evaluation in Context,* 51 Iowa L. Rev. 825, 826-35 (1966). Evidence Code Section 1500 and its predecessors (former Code Civ. Proc. §§ 1855, 1937, 1938) codified a long-standing common law doctrine.

THE BEST EVIDENCE RULE AND ITS EXCEPTIONS

As codified in Evidence Code Section 1500, the Best Evidence Rule provides:

> Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

The rule pertains only to proof of the content of a "writing," which is defined broadly to include "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof."[2]

There are many statutory exceptions to the rule's requirement that the proponent introduce the original of the writing.[3] In particular, duplicates are admissible to the same extent as the original unless "(a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[4] Moreover, the Best Evidence Rule does not exclude the following types of evidence:

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2. Evid. Code § 250. With respect to other types of proof, there is no "best evidence" requirement. "To subject all evidence to the scrutiny of the judge for determination of whether it is the best evidence would unnecessarily disrupt court proceedings and would unduly encumber the party having the burden of proof." Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 260; *see also* C. McCormick, Evidence 409, 413-14 (4th ed. 1992).

3. See Evid. Code §§ 1500.5-1566; Penal Code § 872.5. All further statutory references are to the Evidence Code, unless otherwise indicated.

4. Section 1511. For the definition of "duplicate," see Section 260. For the definition of "original," see Section 255.

- Printed representations of computer information and computer programs.[5]
- Printed representations of images stored on video or digital media.[6]
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence.[7]
- Secondary evidence of unavailable writings.[8]
- Secondary evidence of writings an opponent has, but fails to produce as requested.[9]
- Secondary evidence of collateral writings that would be inexpedient to produce.[10]
- Secondary evidence of writings in the custody of a public entity.[11]
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute.[12]
- Secondary evidence of voluminous writings.[13]
- Copies of writings that were produced at the hearing and made available to the other side.[14]
- Certain official records and certified copies of writings in official custody.[15]

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5. Section 1500.5.
6. Section 1500.6.
7. Sections 1501, 1505.
8. Sections 1502, 1505..
9. Sections 1503(a), 1505.
10. Sections 1504, 1505.
11. Sections 1506, 1508.
12. Sections 1507, 1508.
13. Section 1509.
14. Section 1510.
15. Sections 1530-1532.

- Photographic copies made as business records.[16]
- Photographic copies of documents lost or destroyed, if properly certified.[17]
- Copies of business records produced in compliance with Sections 1560-1561.[18]

The number of these exceptions prompted one commentator to state that "the Best Evidence Rule has been treated by the judiciary and legislature as an unpleasant fact which must be avoided through constantly increasing and broadening the number of 'loopholes.'"[19]

AN ALTERNATIVE: THE SECONDARY EVIDENCE RULE

The Best Evidence Rule, with its many exceptions and emphasis on identifying the original, is not the only possible approach to admissibility of secondary evidence in proving the content of a writing. Commentators have suggested a number of other approaches, including a comparatively simple rule on secondary evidence (hereinafter the "Secondary Evidence Rule").[20] Instead of making secondary evidence

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16. Section 1550.

17. Section 1551.

18. Sections 1562, 1564, 1566.

19. Taylor, *The Case for Secondary Evidence,* Case & Comment 46, 48 (Jan.-Feb. 1976). Many of the exceptions also appear in the Federal Rules of Evidence. See Fed. R. Evid. 1001-1008.

20. The rule discussed in the text is suggested in Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 282-83. Other proposed approaches include:

> (1) Professor Kenneth Broun's proposal, which would allow the court "to require the party seeking to offer secondary evidence of the contents of a writing to produce the original writing for inspection, if it is under his control, or to state his reasons for not producing it." Broun, *Authentication and Contents of Writings,* 1969 Law & Soc. Ord. 611, 617.

presumptively inadmissible to prove the content of a writing, this rule would make such evidence generally admissible. The court would, however, be required to exclude secondary evidence if it determines that either (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or (2) admission of the secondary evidence would be unfair.

As envisioned by the Law Revision Commission, the Secondary Evidence Rule would not extend to oral testimony of the content of a writing. Because people usually cannot accurately recall the words of a writing, oral testimony of the content of a writing would remain inadmissible, except in the circumstances where it is currently permitted.[21]

In light of the broad exceptions to the Best Evidence Rule, the Secondary Evidence Rule would not amount to a major change in existing practice. In fact, the basic approach already applies to duplicates.[22] It would, however, be a simpler and

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(2) Wigmore's approach, under which "[p]roduction of the original may be dispensed with, in the trial court's discretion, whenever in the case in hand the opponent does not bona fide dispute the contents of the document and no other useful purpose will be served by requiring production." 4 J. Wigmore, Evidence in Trials at Common Law 434 (J. Chadbourn ed. 1972).

(3) Making secondary evidence of the content of a writing and the original of the writing equally admissible. *See* Taylor, *supra* note 19, at 48-49.

21. As proposed in Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 282-83, the Secondary Evidence Rule would apply to oral testimony and documentary evidence. The authors acknowledge, however, that "the chance of error is substantial when a witness purports to recall from memory the terms of a writing." *Id.* at 259. *See also* Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1987), *cert. denied,* 484 U.S. 826 (1987) ("The human memory is not often capable of reciting the precise terms of a writing ....").

22. See Section 1511. See also Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes would be a source of guidance in applying the Secondary Evidence Rule. *See, e.g.,* United States v. Sinclair, 74 F.3d 753, 760-61 (7th Cir. 1996) (admitting copies of expense account reports was not unfair); Ruberto v. Commissioner of Internal Revenue, 774 F.2d 61, 64 (2d Cir. 1985)

more straightforward doctrine than the exception-ridden Best Evidence Rule. Examining the rationale for the Best Evidence Rule provides further insight into the merits of the two rules.

RATIONALE FOR THE BEST EVIDENCE RULE

Section 1500 and most of its exceptions were enacted in 1965 as part of the Evidence Code drafted by the Law Revision Commission.[23] Since then, there has been rapid technological change, including a sharp rise in use of photocopies and electronic communications. There have also been expansions in pretrial discovery. These developments prompted the Commission to review the continued utility of the Best Evidence Rule.

There are two main arguments for the rule: preventing fraud and guarding against misinterpretation of writings.

Fraud Deterrence

Some courts and commentators maintain that the Best Evidence Rule guards against incomplete or fraudulent proof.[24] The underlying assumption is that an original writing is less susceptible to fraudulent manipulation than a copy of the

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(tax court did not err in excluding photocopies of canceled checks, "since problems in matching the copies of the backs of the checks with copies of the fronts made them somewhat suspect"); Amoco Production Co. v. United States, 619 F.2d 1383, 1391 (10th Cir. 1980) (approving trial court's determination that "admission of the file copy would be unfair because the most critical part of the original conformed copy ... is not completely reproduced in the 'duplicate'"); People v. Garcia, 201 Cal. App. 3d 324, 330, 247 Cal. Rptr. 94 (1988) (claim of unfairness "must be based on substance, not mere speculation that the original might contain some relevant difference").

23. 1965 Cal. Stat. ch. 299, § 2. For the Commission's recommendation proposing the Evidence Code, see *Recommendation Proposing an Evidence Code,* 7 Cal. L. Revision Comm'n Reports 1 (1965).

24. *See, e.g.,* 5 J. Weinstein, M. Berger & J. McLaughlin, Weinstein's Evidence 1002-06 (hereinafter Weinstein's Evidence); *see also* Cleary & Strong, *supra* note 1, at 826-28.

writing or oral testimony about the writing.[25] By excluding secondary evidence and admitting only originals, the Best Evidence Rule is said to reduce fraud.

The fraud rationale is undercut by the reality that even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions.[26]

Alternatively, an unscrupulous litigant may create false evidence and introduce it as an original, circumventing the rule. There are simple techniques for creating a fake original, as by replacing key pages with different text. New technologies, such as scanning and manipulating signatures, make it easier to fabricate a document that appears to be an original. That development undercuts the key assumption of the fraud rationale, that fraudulent manipulation of an original is more difficult than fraudulent manipulation of secondary evidence.

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25. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 259.

26. Professors Cleary and Strong explain that where "fraud is actually contemplated through the use of fabricated or distorted secondary evidence," it is unlikely

> that any litigant not in control of the original of a document would put himself in the position of introducing false or inaccurate testimony as to the terms of a document, or a false or inaccurate copy, only to be confounded by the adversary's production of the original. A litigant in possession of an original and totally bent on fraud might of course avert the above risk by failing to disclose the original on discovery and proceeding to introduce false or distorted secondary evidence with relative impunity. It may be noted, however, that the best evidence rule itself provides no absolute protection against this species of attempted fraud. The litigant determined to introduce fabricated secondary evidence can hardly be expected to stick at manufacturing an excuse sufficient to procure its admission under one of the numerous currently recognized exceptions to the best evidence rule.

Cleary & Strong, *supra* note 1, at 847; *see also* Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 259.

As Wigmore and others have pointed out, the fraud rationale is also inconsistent with the scope of the Best Evidence Rule.[27] There are situations in which the rule applies yet ought not to apply if the goal is fraud deterrence, such as where the honesty of the proponent is not in question.[28]

Thus, fraud prevention is not the leading modern rationale for the Best Evidence Rule.[29] In explaining the intent of the rule, the Comment to Section 1500 refers to misinterpretation of writings, but does not mention the fraud rationale.[30]

Still, no means of fraud control is perfect. Although the Best Evidence Rule may be ineffective as a fraud deterrent, it may prevent fraud to some extent. The mandatory exceptions to the Secondary Evidence Rule may achieve a similar effect.

More fundamentally, the breadth of modern discovery severely undercuts not only the fraud rationale but also the other rationale for the Best Evidence Rule: minimizing misinterpretation of writings.

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27. Wigmore, *supra* note 20, at 417-19; *see also* Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1987), *cert. denied,* 484 U.S. 826 (1987); Cleary & Strong, *supra* note 1, at 827 & n.18.

28. Wigmore, *supra* note 20, at 418. Wigmore further explains that "certain details of the rule" show that fraud deterrence is not the actual reason for it:

> [P]ossession of the document by a disinterested third person would relieve the proponent from the suspicion of fraudulent suppression, yet the rule applies equally to that case; and the possession by the opponent himself with the right not to produce it will also serve to dismiss the suspicion, yet the rule applies equally to that case.
>
> Finally, if the above reason were the correct one, the rule would equally apply to objects other than writings; yet it is generally conceded that it does not.

Id.; *see also* Cleary & Strong, *supra* note 1, at 827 n. 18.

29. Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1319 (9th Cir. 1987), *cert. denied,* 484 U.S. 826 (1987).

30. The Comment to Section 1500 states in relevant part: "The rule is designed to minimize the possibilities of misinterpretation of writings by requiring production of the original writings themselves, if available."

Minimizing Misinterpretation of Writings

The rationale given in the Comment to Evidence Code Section 1500 is that the Best Evidence Rule is "designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." Underlying this rationale are several concepts:

- In litigation, the exact words of a writing are often especially important, particularly with regard to contracts, wills, and other such instruments. The exact words of a document may be easier to discern from an original than from secondary evidence.
- An original document may provide clues to interpretation not present on copies or other secondary evidence, such as the presence of staple holes or the color of ink.
- Secondary evidence of the contents of a document, such as copies and oral testimony, may not faithfully reflect the original. Copying techniques are imperfect and memories are fallible.[31]

Preventing misinterpretation of writings is an important goal. Yet modern expansion of the breadth of discovery undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of trial.[32]

Professors Cleary and Strong, leading proponents of the Best Evidence Rule, acknowledged in 1966 that increases in the breadth of discovery diminished the rule's significance.[33]

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31. *See* Weinstein's Evidence, *supra* note 24, at 1002-06; Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 258-59.

32. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 258, 279; *see also* Broun, *supra* note 20, at 617-18.

33. Cleary & Strong, *supra* note 1, at 837.

Nonetheless, they maintained that the rule continued to operate usefully in certain areas:[34]

Unanticipated documents and unanticipated use of known documents. Exhaustive discovery is not always reasonable discovery, and reasonable discovery may fail to disclose all relevant documents or focus attention on all possible uses of those documents. Thus, even with broad pretrial discovery, a litigant may on occasion confront an opponent with an unanticipated document at trial, or an unexpected emphasis on a known document. In such circumstances, the Best Evidence Rule may force production of an original that might otherwise be withheld in favor of secondary evidence.[35]

Still, today there is relatively little likelihood that a diligent civil litigant will be confronted with a significant unanticipated document at trial. Although broad pretrial discovery was a relatively new phenomenon when Professors Cleary and Strong championed the Best Evidence Rule, it is now so routine that litigants are almost always quite familiar with the critical documents by the time of trial.

If a key document does surface for the first time at trial, it may be admissible under an exception to the Best Evidence Rule. Even if the rule requires use of the original, in many such instances no benefit will flow from use of the original as opposed to secondary evidence. Only in a tiny subset of cases involving unanticipated documents, or unanticipated use of known documents, will the Best Evidence Rule be of any use.[36]

Those situations could also be addressed through application of the Secondary Evidence Rule. For instance, attempted use of a writing in a manner that could not reasonably have

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34. *Id.* at 847.

35. *Id.* at 839-40; *see also* 5 D. Louisell & C. Mueller, Federal Evidence 394 (1981).

36. *See* Broun, *supra* note 20, at 616, 618-19.

been anticipated would be a factor for the court to consider in applying the rule's mandatory exceptions.

Documents outside the jurisdiction. Some authorities claim that the Best Evidence Rule is useful with regard to documents beyond the court's jurisdiction.[37] Professors Cleary and Strong observed, however, that the rule is largely ineffective in obtaining production of original writings in the control of persons beyond the court's jurisdiction.[38] Instead, courts commonly rule that such evidence falls within one or more of the rule's exceptions.[39] For example, Section 1502 specifically directs that a copy "is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means." In light of this exception, there may not be any cases, much less a significant number of such cases, in which the rule excludes secondary evidence of the contents of documents outside the jurisdiction.[40] Any such instances could also be addressed by the unfairness exception to the Secondary Evidence Rule.

Criminal cases. When the Best Evidence Rule was codified in the 1960s, proponents of the rule maintained that it was important in criminal cases, because opportunities for pretrial discovery in those cases were more limited than in civil cases.[41] The scope of pretrial discovery in criminal cases has

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37. *See, e.g.*, Fed. R. Evid. 1001 advisory committee's note.

38. Cleary & Strong, *supra* note 1, at 844.

39. *Id.*

40. *Cf.* Broun, *supra* note 20, at 618 (documents outside the jurisdiction do not justify federal version of the Best Evidence Rule).

41. *See* Cleary & Strong, *supra* note 1, at 844-45; Fed. R. Evid. 1001 advisory committee's note.

expanded greatly since that time, although it remains narrower than in civil cases.[42]

Thus, even in the criminal context the continued utility of the Best Evidence Rule is questionable.[43] With an extra exception to account for the limits on discovery in criminal cases, the Secondary Evidence Rule would provide similar protection against fraud and misinterpretation of writings. Specifically, a mandatory exception for criminal cases would, with limitations, condition use of secondary evidence on making the original reasonably available if the proponent has it. That would discourage use of any misleading secondary evidence.

OTHER SAFEGUARDS AGAINST FRAUD AND MISINTERPRETATION

The Best Evidence Rule is not the only protection against fraud and misinterpretation of writings, nor is it the only incentive for litigants to use original documents. There is also the normal motivation of the parties to present the most convincing evidence in support of their cases. If a litigant inexplicably proffers secondary evidence instead of an original, the trier of fact is likely to discount the probative value of the evidence, particularly if opposing counsel draws attention to the point in cross-examination or closing argument.[44] Indeed, Section 412 specifically directs: "If weaker and less satisfactory evidence is offered when it was within the power of the

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42. *See* Penal Code §§ 1054.1, 1054.3; Izazaga v. Superior Court, 54 Cal. 3d 356, 372, 377, 815 P.2d 304, 285 Cal. Rptr. 231 (1991); People v. Jackson, 15 Cal. App. 4th 1197, 1201, 19 Cal. Rptr. 2d 80 (1993).

43. *Cf.* Broun, *supra* note 20, at 619 (arguing that the Best Evidence Rule was unnecessary under the then-existing federal discovery scheme).

44. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 282; *see also* Cleary & Strong, *supra* note 1, at 846-47.

party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Additionally, Section 352 gives the court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In some cases, Section 352 may serve as a basis for excluding unreliable secondary evidence.[45]

COSTS OF THE BEST EVIDENCE RULE

Commentators have pointed out significant costs of the Best Evidence Rule.[46] For example, Professor Broun stated in 1969 that the rule

> has produced and will continue to produce ... results that not only waste precious judicial time but that are clearly unjust. While the rule ostensibly protects against fraud and inaccuracy, it has been blindly applied as a technical hurdle that must be overcome if documentary evidence is to be admitted, despite the fact that fraud or inaccuracy are but minute possibilities in the particular case. The single valuable function of the rule — that is, to insure that the original of a writing is available for inspection so that its genuineness and the accuracy of secondary evidence with regard to it can be tested under the scrutiny of the adversary system — is often ignored in favor of a rigid application of the exclusionary feature of the rule. Thus, exclusion may be required under the rule even though the party opposing the document has had adequate opportunity to scrutinize the original writing, and

45. *See* Taylor, *supra* note 19, at 48-49.

46. *See* Broun, *supra* note 20, at 611-24; Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 258, 279-80, 283; Wigmore, *supra* note 20, at 434-35; Taylor, *supra* note 19, at 48-49; Note, *Best Evidence Rule — The Law in Oregon,* 41 Or. L. Rev. 138, 153 (1962).

> even though that party could himself have introduced the original if he had any question as to either its genuineness or the accuracy of the secondary evidence introduced by his opponent.[47]

Similarly, Wigmore commented that the Best Evidence Rule

> sound at core as it is, tends to become encased in a stiff bark of rigidity. Thousands of times it is enforced needlessly. Hundreds of appeals are made upon nice points of its detailed application which bear no relation at all to the truth of the case at bar. For this reason the whole rule is in an unhealthy state. The most repugnant features of technicalism ... are illustrated in this part of the law of evidence.[48]

These remarks may overstate the detriments of the best evidence rule, but it is clear that the rule is complicated and presents difficulties in determining points such as: When is an object with words on it a "writing" within the meaning of the rule? When is a litigant seeking to prove the content of a writing? What is the "original" of a writing?[49] Advances in technology, such as fax machines, electronic mail systems,

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47. Broun, *supra* note 20, at 611-12. Professor Broun supported his points with case illustrations and identified issues that posed problems in applying the rule. *See id.* at 620-24.

48. Wigmore, *supra* note 20, at 435.

49. *See, e.g.*, United States v. Jones, 958 F.2d 520 (2d Cir. 1992) (IRS transcript of 1982 tax liability was admissible because it was not being offered to prove content of 1982 tax return); Doe v. United States, 805 F. Supp. 1513, 1517 (D. Hawaii 1992) (Best Evidence Rule inapplicable because computer records were offered to prove HIV test results, not content of writing); People v. Bizieff, 226 Cal. App. 3d 1689, 1696-98, 277 Cal. Rptr. 678 (1991) (credit card was the original, credit card receipt was not a duplicate, Best Evidence Rule did not preclude oral testimony of name on credit card); People v. Mastin, 115 Cal. App. 3d 978, 982-86, 171 Cal. Rptr. 780 (1981) (applicability of Best Evidence Rule to inscribed chattels); B. Jefferson, California Evidence Benchbook §§ 31.1-31.7 (2d ed. 1982 & Supp. June 1990); J. Weinstein, J. Mansfield, N. Abrams & M. Berger, Cases & Materials on Evidence 211-40 (8th ed. 1988).

and computer networks, pose new possibilities for confusion and inconsistencies in application of the Best Evidence Rule.[50] These complexities may trap inexperienced litigators and, regardless of the experience of counsel, may lead to disputes over application of the Best Evidence Rule.

In some cases, the result may be exclusion of reliable evidence, injustice, and reversal on appeal followed by a costly retrial.[51] More often, the trial court may resolve the dispute

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50. For example, if a document is downloaded from a computer network, is the downloaded information an "original" or an admissible "duplicate?" What about a printout of that information? Is the answer different if the document is converted from one word processing system to another? What if formatting adjustments are made, such as changes in page width, pagination, paragraph spacing, font size, or font? Is the answer different for a pagination change in a document with internal page references than for a pagination change in a document lacking such references? Is the answer different if the change is from Courier font (abcd) to Monaco (abcd), rather than from Courier to Zapf Dingbats (✪❂✻✽)?

Similarly, suppose a document is prepared on a computer and faxed directly from the computer without making a printout. What is the "original" of the document? Is the answer the same as for a document that is printed from a computer and then faxed? What if a document is printed from a computer, signed manually, and then faxed? Does the Best Evidence Rule apply differently if a digital, rather than manual, signature is attached and the same document is faxed directly from the computer without ever being printed?

For additional discussion along these lines, see Letter from Gerald H. Genard to California Law Revision Commission (May 4, 1994) (attached to Memorandum 95-34, on file with California Law Revision Commission) (expressing uncertainty regarding application of the best evidence doctrine to faxes and digital signatures). See also Section 1500.6 (1996 Cal. Stat. ch. 345), which is a new exception to the Best Evidence Rule for images stored on video or digital media.

51. For examples of cases reversed on best evidence grounds, see Moretti v. Commissioner of Internal Revenue, 77 F.3d 637, 645 (2d Cir. 1996) (exclusion of photocopies without affording opportunity to establish best evidence exception was erroneous); Amoco Production Co. v. United States, 619 F.2d 1383, 1389-91 (10th Cir. 1980) (trial court erred in ruling that "the availability of a properly recorded version of the 1942 deed precluded admission of any other evidence of the contents of the deed"); Brown v. Bowen, 668 F. Supp. 146, 149 (E.D.N.Y. 1987) ("The ALJ incorrectly applied a rigid evidentiary rule of exclusion by requiring that the 'best evidence' of the acknowledgment, the original document, be produced."). See also Osswald v. Anderson, __ Cal. App. 4th __, 57 Cal. Rptr. 2d 23, 27 (1996), in which the trial court admitted a copy of a

correctly, but only after the litigants and the court devote scarce resources to determining fine points of the Best Evidence Rule, which may have to be relitigated on appeal at further expense.[52] Waste may also occur in a third way: To preclude a best evidence objection, a litigant may expend effort tracking down the original of a writing, even though secondary evidence of the writing may be easier to obtain and equally valuable in the pursuit of justice.

The Secondary Evidence Rule would not dramatically alter the admissibility of secondary evidence to prove the content of a writing, but would help alleviate these problems. It is a simpler, more straightforward doctrine than the Best Evidence Rule, so it should be easier for courts and litigants to apply. The doctrine also de-emphasizes the form of the writing (whether it is an original or secondary evidence) and properly focuses on the genuineness of secondary evidence and fairness of using it. By directing attention to substance rather than technicalities, the rule would help eliminate unnecessary disputes and occasional injustice.

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deed, even though there were "genuine questions regarding the authenticity of the original deed and the copy, thus invalidating the exception to the best evidence rule under Evidence Code section 1511." Under the Secondary Evidence Rule, instead of considering a panoply of exceptions, the trial court would have focused on the critical point, whether a genuine dispute existed concerning material terms of the writing and justice required the exclusion.

52. *See, e.g.*, People v. Atkins, 210 Cal. App. 3d 47, 53-55, 258 Cal. Rptr. 113 (1989) (upholding trial court ruling that photocopies of certain documents were admissible); People v. Garcia, 201 Cal. App. 3d 324, 327-30, 247 Cal. Rptr. 94 (1988) (upholding trial court ruling that photo of sketch of suspect was admissible).

COMMISSION RECOMMENDATION

The Best Evidence Rule is an anachronism. In yesterday's world of manual copying and limited pretrial discovery, it served as a safeguard against misleading use of secondary evidence. Under contemporary circumstances, in which high quality photocopies are standard and litigants have broad opportunities for pretrial inspection of original documents, the Best Evidence Rule is no longer necessary to protect against unreliable secondary evidence. Because the rule's costs now outweigh its benefits, the Law Revision Commission recommends that it be repealed.

In general, normal motivations to present convincing evidence deter use of unreliable secondary evidence. To further protect against misinterpretation of writings, the Best Evidence Rule and its numerous exceptions should be replaced with the comparatively simple Secondary Evidence Rule.[53] Rather than making secondary evidence presumptively inadmissible to prove the content of a writing, the new rule makes such evidence admissible, but requires the court to exclude secondary evidence if it determines either that (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or that (2) admission of the secondary evidence would be unfair.

As proposed here, the Secondary Evidence Rule would not govern the admissibility of oral testimony of the content of a writing. Such evidence is less reliable than other types of secondary evidence.[54] To safeguard the truth-seeking process,

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53. Note, *The Best Evidence Rule: A Critical Appraisal of the Law in California, supra* note 1, at 282-83.

54. *See, e.g., id.* at 258-59; Cleary & Strong, *supra* note 1, at 828-29. Oral testimony is also more difficult to control than documentary evidence. The witness may blurt out statements that cannot effectively be set aside through a

the proposed legislation would preserve existing law making oral testimony inadmissible to prove the content of a writing, except in limited circumstances.

The proposed legislation also incorporates an exception to the Secondary Evidence Rule to account for limitations on discovery in criminal cases. Specifically, if the proponent of secondary evidence in a criminal case has possession of the original, secondary evidence would generally be admissible only if the proponent made the original reasonably available for inspection. With this provision, the Secondary Evidence Rule would be a straightforward, effective approach, adaptable to new technologies.

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limiting instruction. In contrast, opposing counsel has an opportunity to review documentary evidence before it is used at trial.

PROPOSED LEGISLATION

Evid. Code §§ 1500-1511 (repealed). Best Evidence Rule

SECTION 1. Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code is repealed.

Note. The text of Sections 1500-1511 is set out *infra* at pp. 400-06.

Evid. Code §§ 1520-1523 (added). Proof of content of writing

SEC. 2. Article 1 (commencing with Section 1520) is added to Chapter 2 of Division 11 of the Evidence Code, to read:

Article 1. Proof of the Content of a Writing

§ 1520. Proof of content of writing by original

1520. The content of a writing may be proved by an otherwise admissible original.

Comment. Section 1520 continues former Section 1500 insofar as it permitted proof of the content of a writing by an original of the writing. See also Sections 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action), 1523 (oral testimony of content of writing).

§ 1521. Proof of content of writing by secondary evidence (Secondary Evidence Rule)

1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of a writing if the court determines either of the following:

(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.

(2) Admission of the secondary evidence would be unfair.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known as the "Secondary Evidence Rule."

Comment. Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action), and 1523 (oral testimony of content of writing) replace the Best Evidence Rule and its exceptions. For background, see *Best Evidence Rule,* 26 Cal. L. Revision Comm'n Reports 369 (1996). Because of the breadth of the exceptions to the Best Evidence Rule, this reform is not a major departure from former law, but primarily a matter of clarification and simplification. Discovery principles remain unchanged.

Subdivision (a) makes secondary evidence generally admissible to prove the content of a writing. The nature of the evidence offered affects its weight, not its admissibility. The normal motivation of parties to support their cases with convincing evidence is a deterrent to introduction of unreliable secondary evidence. See also Section 412 (if party offers weaker and less satisfactory evidence despite ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust).

The mandatory exceptions set forth in subdivisions (a)(1) and (a)(2) provide further protection against unreliable secondary evidence. Those exceptions are modeled on the exceptions to former Section 1511 and to Rule 1003 of the Federal Rules of Evidence. Cases interpreting those statutes provide guidance in applying subdivisions (a)(1) and (a)(2). *See, e.g.,* United States v. Sinclair, 74 F.3d 753, 760-61 (7th Cir. 1996) (admitting copies of expense account reports was not unfair); Ruberto v. Commissioner of Internal Revenue, 774 F.2d 61, 64 (2d Cir. 1985) (tax court did not err in excluding photocopies of canceled checks, "since problems in matching the copies of the backs of the checks with copies of the fronts made them somewhat suspect"); Amoco Production Co. v. United States, 619 F.2d 1383, 1391 (10th Cir. 1980) (upholding trial court's determination that "admission of the file copy would be unfair because the most critical part of the original conformed copy ... is not completely reproduced in the 'duplicate'"); People v. Garcia, 201 Cal. App. 3d 324, 330, 247 Cal. Rptr. 94 (1988) (claim of unfairness "must be based on substance, not mere speculation that the original might contain some relevant difference"). Courts may consider a broad range of factors, for example: (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated, (2) whether the original was suppressed in discovery, (3) whether discovery conducted in

a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original, (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to interpretation), (5) whether the original is unavailable and, if so, why, and (6) whether the writing is central to the case or collateral. A classic circumstance for exclusion pursuant to subdivision (a)(2) is if the proponent destroyed the original with fraudulent intent or the doctrine of spoliation of evidence otherwise applies.

Subdivision (b) explicitly establishes that Section 1523 (oral testimony of the content of writing), not Section 1521, governs the admissibility of oral testimony to prove the content of a writing.

Subdivision (c) makes clear that like other evidence, secondary evidence is admissible only if it is properly authenticated. Under Section 1401, the proponent must not only authenticate the original writing, but must also establish that the proffered evidence is secondary evidence of the original. *See* B. Jefferson, Jefferson's Synopsis of California Evidence Law, § 30.1, at 470-71 (1985).

§ 1522. Exclusion of secondary evidence in criminal action

1522. (a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial. This section does not apply to any of the following:

(1) A duplicate as defined in Section 260.

(2) A writing that is not closely related to the controlling issues in the action.

(3) A copy of a writing in the custody of a public entity.

(4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

(b) In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or other law, shall not be made in the presence of the jury.

Comment. Subdivision (a) of Section 1522 sets forth a mandatory exception applicable only in criminal cases, which are governed by narrower discovery rules than civil cases. See Section 130 ("criminal action" includes criminal proceedings). See also Penal Code §§ 1054-1054.7 (discovery in criminal cases). Section 1522 does not expand discovery obligations, it simply conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. In determining whether the proponent of secondary evidence has made the original "reasonably available," the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may in general suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system.

The exceptions in subdivisions (a)(1)-(a)(4) are drawn from exceptions to the former Best Evidence Rule (former Section 1500). Subdivision (a)(1) is drawn from former Section 1511. Subdivision (a)(2) is drawn from former Section 1504. Subdivision (a)(3) is drawn from former Section 1506. Subdivision (a)(4) is drawn from former Section 1507.

Subdivision (b) continues the requirement of the second sentence of former Section 1503(a), but applies it to all requests for exclusion of secondary evidence in a criminal trial.

See also Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), and 1523 (oral testimony of content of writing).

§ 1523. Oral testimony of content of writing

1523. (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole.

Comment. Section 1523 preserves former law governing the admissibility of oral testimony to prove the content of a writing. See former Sections 1500, 1501-1509.

Subdivision (a) is based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing. For background, see *Best Evidence Rule,* 26 Cal. L. Revision Comm'n Reports 369 (1996).

Subdivision (b) continues former Sections 1501 and 1505 without substantive change as to oral testimony of the content of a writing that is lost or has been destroyed.

Subdivision (c)(1) continues former Sections 1502 and 1505 without substantive change as to oral testimony of the content of a writing that was not reasonably procurable. In effect, subdivision (c)(1) also continues former Sections 1503 and 1505 without substantive change as to oral testimony of the content of a writing that the opponent has, but failed to produce at the hearing despite being expressly or impliedly notified that it would be needed. Under such circumstances, the writing was not reasonably procurable. Finally, subdivision (c)(1) continues former Sections 1506-1508 without substantive change as to oral testimony of the content of a writing where (1) the writing is in the custody of a public entity and the proponent could not have obtained it or a copy of it in the exercise of reasonable diligence, or (2) the writing has been recorded in the public records, the record or a certified copy of the writing is made evidence of the writing by statute, and the proponent could not have obtained it or a copy of it in the exercise of reasonable diligence. Subdivision (c)(2) continues former Sections 1504 and 1505 without substantive change as to oral testimony of the content of a collateral writing.

Subdivision (d) continues former Section 1509 without substantive change as to oral testimony of a voluminous writing.

See Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), and 1522 (exclusion of secondary evidence in criminal action).

Heading of Article 3 (commencing with Section 1550) (amended)

SEC. 3. The heading of Article 3 (commencing with Section 1550) of Chapter 2 of Division 11 of the Evidence Code is amended to read:

Article 3. Photographic Copies *and Printed Representations* of Writings

Comment. The article heading is amended to reflect the repeal of the Best Evidence Rule and the addition of Sections 1552 (computer printouts) and 1553 (printouts of images stored on video or digital media) to this article. See Comments to Section 1521 and former Sections 1500.5 and 1500.6.

Evid. Code § 1552 (added). Computer printout

SEC. 4. Section 1552 is added to the Evidence Code, to read:

1552. (a) A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

(b) Subdivision (a) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.

Comment. Subdivision (a) of Section 1552 continues former Section 1500.5(c) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule. See Section 1521 Comment. See also Section 255 (accurate printout of computer data is an "original").

Subdivision (b) continues former Section 1500.5(d) without substantive change.

Evid. Code § 1553 (added). Printout of images stored on video or digital media

SEC. 5. Section 1553 is added to the Evidence Code, to read:

1553. A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

Comment. Section 1553 continues the last three sentences of the second paragraph of former Section 1500.6 without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule. See Section 1521 Comment.

Penal Code § 872.5 (repealed). Best Evidence Rule in preliminary examination

SEC. 6. Section 872.5 of the Penal Code is repealed.

~~872.5. The best evidence rule shall not apply to preliminary examinations.~~

Comment. Former Section 872.5 is repealed to reflect the repeal of the Best Evidence Rule and adoption of the Secondary Evidence Rule. See Evid. Code §§ 1520-1523 & Comments. See also new Section 872.5.

Penal Code § 872.5 (added). Secondary evidence in preliminary examination

SEC. 7. Section 872.5 is added to the Penal Code, to read:

872.5. Notwithstanding Article 1 (commencing with Section 1520) of Chapter 2 of Division 11 of the Evidence Code, in a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

Comment. Section 872.5 is added to reflect the repeal of the Best Evidence Rule and adoption of the Secondary Evidence Rule. See Evid. Code §§ 1520-1523 & Comments. See also former Section 872.5.

Penal Code § 1417.7 (amended). Photographic records of exhibits

SEC. 8. Section 1417.7 of the Penal Code is amended to read:

1417.7. Not less than 15 days before any proposed disposition of an exhibit pursuant to Section 1417.3, 1417.5, or 1417.6, the court shall notify the district attorney (or other prosecuting attorney), the attorney of record for each party, and each party who is not represented by counsel of the proposed disposition. Before the disposition, any party, at his or her own expense, may cause to be prepared a photographic record of all or part of the exhibit by a person who is not a party or attorney of a party. The clerk of the court shall observe the taking of the photographic record and, upon receipt of a declaration of the person making the photographic record that the copy and negative of the photograph delivered

to the clerk is a true, unaltered, and unretouched print of the photographic record taken in the presence of the clerk ~~and~~, the clerk shall certify the photographic record as such without charge and retain it unaltered for a period of 60 days following the final determination of the criminal action or proceeding. A certified photographic record of exhibits ~~shall be deemed a certified copy of a writing in official custody pursuant to Section 1507~~ *shall not be deemed inadmissible pursuant to Section 1521 or 1522* of the Evidence Code.

Comment. Section 1417.7 is amended to reflect the repeal of the Best Evidence Rule and the adoption of the Secondary Evidence Rule. See Evid. Code §§ 1520-1523 & Comments. Section 1417.7 is also amended to make technical changes.

Uncodified (added). Operative date

SEC. 9. (a) This act shall become operative on January 1, 1998.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 1998.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 1998, that evidence is inadmissible pursuant to a provision of former article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code. However, if an action or proceeding is pending on January 1, 1998, the proponent of evidence excluded pursuant to a provision of former article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code may, on or after January 1, 1998, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

COMMENTS TO REPEALED SECTIONS

Evid. Code §§ 1500-1511 (repealed). Best Evidence Rule

Note. The text of repealed Sections 1500-1511 is reproduced below for reference purposes.

Article 1. Best Evidence Rule

Comment. The Best Evidence Rule is repealed and replaced with the Secondary Evidence Rule. See new Article 1 (commencing with Section 1520).

§ 1500 (repealed). Best Evidence Rule

~~1500. Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.~~

Comment. Former Section 1500 is superseded by Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action) and 1523 (oral testimony of content of writing).

§ 1500.5 (repealed). Computer recorded information and computer programs

~~1500.5. (a) Notwithstanding the provisions of Section 1500, a printed representation of computer information or a computer program which is being used by or stored on a computer or computer readable storage media shall be admissible to prove the existence and content of the computer information or computer program.~~

~~(b) Computer recorded information or computer programs, or copies of computer recorded information or computer programs, shall not be rendered inadmissible by the best evidence rule.~~

~~(c) Printed representations of computer information and computer programs will be presumed to be accurate~~

~~representations of the computer information or computer programs that they purport to represent. This presumption, however, will be a presumption affecting the burden of producing evidence only. If any party to a judicial proceeding introduces evidence that such a printed representation is inaccurate or unreliable, the party introducing it into evidence will have the burden of proving, by a preponderance of evidence, that the printed representation is the best available evidence of the existence and content of the computer information or computer programs that it purports to represent.~~

~~(d) Subdivision (c) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.~~

Comment. Section 1500.5 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Subdivisions (c) and (d) are continued in Section 1552 (computer printout) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to the replacement of the Best Evidence Rule with the Secondary Evidence Rule.

§ 1500.6 (repealed). Images stored on video or digital media

~~1500.6. (a) Notwithstanding Section 1500, a printed representation of an image stored on video or digital media shall be admissible to prove the existence and content of the image stored on the video or digital media.~~

~~Images stored on video or digital media, or copies of images stored on video or digital media, shall not be rendered inadmissible by the best evidence rule. Printed representations of images stored on video or digital media shall be presumed to be accurate representations of the images that they purport to represent. This presumption, however, is a presumption affecting the burden of producing evidence only. If any party to a judicial proceeding introduces evidence that such a printed representation is inaccurate or unreliable, the party introducing it into evidence shall have the burden of proving,~~

~~by a preponderance of evidence, that the printed representation is the best available evidence of the existence and content of the images that it purports to represent.~~

~~(b) This section shall not be construed to abrogate the holding of People v. Enskat, (1971) 20 Cal. App. 3d Supp. 1.~~

Comment. Section 1500.6 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. The last three sentences of the second paragraph of Section 1500.6 are continued in Section 1553 (printout of images stored on video or digital media) without substantive change, except that the reference to "best available evidence" is changed to "an accurate representation," due to replacement of the Best Evidence Rule with the Secondary Evidence Rule.

§ 1501 (repealed). Copy of lost or destroyed writing

~~1501. A copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.~~

Comment. Section 1501 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing that is lost or has been destroyed, the combined effect of former Sections 1501 and 1505 is continued in Section 1523 (oral testimony of content of writing) without substantive change.

§ 1502 (repealed). Copy of unavailable writing

~~1502. A copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means.~~

Comment. Section 1502 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing that was not reasonably procurable, the combined effect of Sections 1502 and 1505 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1503 (repealed). Copy of writing under control of opponent

~~1503. (a) A copy of a writing is not made inadmissible by the best evidence rule if, at a time when the writing was under~~

~~the control of the opponent, the opponent was expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing, and on request at the hearing the opponent has failed to produce the writing. In a criminal action, the request at the hearing to produce the writing may not be made in the presence of the jury.~~

~~(b) Though a writing requested by one party is produced by another, and is thereupon inspected by the party calling for it, the party calling for the writing is not obliged to introduce it as evidence in the action.~~

Comment. Section 1503 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing, the combined effect of former Section 1505 and the first sentence of subdivision (a) is continued without substantive change in Section 1523 (oral testimony of content of writing).

The requirement of the second sentence of subdivision (a) is continued without substantive change in Section 1522 (exclusion of secondary evidence in criminal action), except that Section 1522 applies that requirement to all requests for exclusion of secondary evidence in a criminal action.

Subdivision (b) is not continued, because it is subsumed in the general principle that parties are under no obligation to introduce evidence they subpoena. That principle remains unchanged even though the specific language of subdivision (b) is not continued.

§ 1504 (repealed). Copy of collateral writing

~~1504. A copy of a writing is not made inadmissible by the best evidence rule if the writing is not closely related to the controlling issues and it would be inexpedient to require its production.~~

Comment. Section 1504 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a collateral writing, the combined effect of former Sections 1504 and 1505 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1505 (repealed). Other secondary evidence of writings described in Sections 1501-1504

~~1505. If the proponent does not have in his possession or under his control a copy of a writing described in Section 1501, 1502, 1503, or 1504, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule. This section does not apply to a writing that is also described in Section 1506 or 1507.~~

Comment. Section 1505 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Insofar as Section 1505 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1523 (oral testimony of content of writing). See Comments to former Sections 1501-1504.

§ 1506 (repealed). Copy of public writing

~~1506. A copy of a writing is not made inadmissible by the best evidence rule if the writing is a record or other writing that is in the custody of a public entity.~~

Comment. Section 1506 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing in the custody of a public entity, the combined effect of former Sections 1506 and 1508 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1507 (repealed). Copy of recorded writing

~~1507. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been recorded in the public records and the record or an attested or a certified copy thereof is made evidence of the writing by statute.~~

Comment. Section 1507 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. As to oral testimony of the content of a writing that has been recorded in the public records, the combined effect of former Sections 1507 and 1508 is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1508 (repealed). Other secondary evidence of writings described in Sections 1506 and 1507

~~1508. If the proponent does not have in his possession a copy of a writing described in Section 1506 or 1507 and could not in the exercise of reasonable diligence have obtained a copy, other secondary evidence of the content of the writing is not made inadmissible by the best evidence rule.~~

Comment. Section 1508 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Insofar as Section 1508 pertains to oral testimony of the content of a writing, it is continued without substantive change in Section 1523 (oral testimony of content of writing). See Comments to former Sections 1506, 1507.

§ 1509 (repealed). Voluminous writings

~~1509. Secondary evidence, whether written or oral, of the content of a writing is not made inadmissible by the best evidence rule if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; but the court in its discretion may require that such accounts or other writings be produced for inspection by the adverse party.~~

Comment. Section 1509 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. To the extent that Section 1509 provided a means of obtaining production of accounts or other writings for inspection, continuation of that aspect is unnecessary because other statutes afford sufficient opportunities for such inspection. *See, e.g.,* Code Civ. Proc. §§ 1985.3, 1987, 2020, 2031; Penal Code §§ 1054.1, 1054.3. Insofar as Section 1509 pertains to oral testimony of the content of voluminous writings, it is continued without substantive change in Section 1523 (oral testimony of content of writing).

§ 1510 (repealed). Copy of writing produced at the hearing

~~1510. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been produced at the~~

~~hearing and made available for inspection by the adverse party.~~

Comment. Section 1510 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment.

§ 1511 (repealed). Duplicate of writing

~~1511. A duplicate is admissible to the same extent as an original unless (a) a genuine question is raised as to the authenticity of the original or (b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.~~

Comment. Section 1511 is repealed to reflect the repeal of the Best Evidence Rule. See Section 1521 Comment. Exceptions to the Secondary Evidence Rule are modeled on the exceptions in former Section 1511. See Section 1521(a) & Comment.

EXHIBIT E-2

Display 1997-1998 Bill History - INFORMATION

COMPLETE BILL HISTORY 02/06/98

BILL NUMBER : S.B. No. 177
AUTHOR : Kopp
TOPIC : Evidence: proof of the content of a writing.
TYPE OF BILL : ACT NUR NAP MAJ NLO NFI NTA

BILL HISTORY
1998
Jan. 22 In Assembly. Read first time. Held at Desk.
Jan. 22 Read third time. Passed. (Ayes 33. Noes 2. Page 3490.) To Assembly.
Jan. 15 Read second time. To third reading.
Jan. 14 From committee: Do pass. (Ayes 5. Noes 1. Page 3430.)
Jan. 6 Set for hearing January 13.
1997
May 12 Hearing postponed by committee.
May 5 From committee with author's amendments. Read second time. Amended. Re-referred to committee.
Apr. 23 Set for hearing May 13.
Mar. 18 From committee: Do pass, but first be re-referred to Com. on JUD. (Ayes 7. Noes 0. Page 443.) Re-referred to Com. on JUD.
Mar. 10 Hearing postponed by committee. Set for hearing April 18.
Feb. 19 Set for hearing March 11.
Jan. 30 To Coms. on CRIM. PRO. and JUD.
Jan. 23 From print. May be acted upon on or after February 22.
Jan. 22 Introduced. Read first time. To Com. on RLS. for assignment. To print.

EXHIBIT E-3

Display 1997-1998 Bill History - INFORMATION

COMPLETE BILL HISTORY 08/21/98

BILL NUMBER : S.B. No. 177
AUTHOR : Kopp
TOPIC : Evidence: proof of the content of a writing.
TYPE OF BILL : INA NUR NAP MAJ NLO NFI NTA

BILL HISTORY

1998

July 6 Chaptered by Secretary of State. Chapter 100, Statutes of 1998.
July 3 Approved by Governor.
June 23 Enrolled. To Governor at 11:30 a.m.
June 18 In Senate. To enrollment.
June 18 Read third time. Passed. (Ayes 56. Noes 15. Page 7504.) To Senate.
June 10 Read second time. To third reading.
June 9 From committee: Do pass. (Ayes 13. Noes 1.)
Feb. 13 To Com. on JUD.
Jan. 22 In Assembly. Read first time. Held at Desk.
Jan. 22 Read third time. Passed. (Ayes 33. Noes 2. Page 3490.) To Assembly.
Jan. 15 Read second time. To third reading.
Jan. 14 From committee: Do pass. (Ayes 5. Noes 1. Page 3430.)
Jan. 6 Set for hearing January 13.

1997

May 12 Hearing postponed by committee.
May 5 From committee with author's amendments. Read second time. Amended. Re-referred to committee.
Apr. 23 Set for hearing May 13.
Mar. 18 From committee: Do pass, but first be re-referred to Com. on JUD. (Ayes 7. Noes 0. Page 443.) Re-referred to Com. on JUD.
Mar. 10 Hearing postponed by committee. Set for hearing April 18.
Feb. 19 Set for hearing March 11.
Jan. 30 To Coms. on CRIM. PRO. and JUD.
Jan. 23 From print. May be acted upon on or after February 22.
Jan. 22 Introduced. Read first time. To Com. on RLS. for assignment. To print.

EXHIBIT E-4

SENATE JUDICIARY COMMITTEE
John L. Burton, Chairman
1997-98 Regular Session

SB 177	S
Senator Kopp	B
As Amended May 5, 1997	
Hearing Date: January 13, 1998	1
Evidence Code	7
JMR:cjt	7

SUBJECT

Best Evidence Rule

DESCRIPTION

This bill would repeal the "best evidence rule" which requires the original of a writing to be offered in evidence to prove the content of the writing, and would replace it with the "secondary evidence rule" which would provide that the content of a writing may be proved by otherwise admissible secondary evidence.

BACKGROUND

The best evidence rule was created in 1965 (Chapter 299) and took effect on January 1, 1967. The best evidence rule was adopted upon a recommendation from the California Law Revision Commission and was adapted from Code of Civil Procedure sections existing at that time. The best evidence rule is set forth in Evidence Code Section 1500 and provides:

> Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

According to the Law Revision Comments to Evidence Code Section 1500, the best evidence rule was "designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available." At the time of its creation, the rule contained ten (10) exceptions which either existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

(more)

CHANGES TO EXISTING LAW

Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "Best Evidence Rule." (Evidence Code §1500.)

This bill would repeal the Best Evidence Rule and replace it with the "secondary evidence rule," providing that the content of a writing may be proved by otherwise admissible secondary evidence unless: (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

Existing law provide that the best evidence rule shall not apply at preliminary examinations. (Penal Code Section 872.5.)

This bill would provides that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

COMMENT

1. Purpose of the bill

In its recommendation to repeal the best evidence rule and replace it with the proposed secondary evidence rule, the California Law Revision Commission maintains that the rationales for the best evidence rule are no longer valid and the costs of the rule outweigh the benefits.

a. Rationales for the best evidence rule no longer valid

1) Fraud deterrence: The Law Revision Commission believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions." (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 379 (1996).) The Commission's report also notes that with the advent of new technologies such as scanning and manipulating signatures it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

2) Minimizing misinterpretation: One of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. The Law Revision Commission Report states that while

preventing misinterpretation of writings is an important goal, modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial." (*Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 381 (1996).)

3) Other ways to safeguard against fraud and misinterpretation:
The Law Revision Commission believes that the best evidence rule is not the only protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

b. Costs of the rule outweigh benefits

According to the Law Revision Commission Report the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend time and resources hunting down the "original" in order to avoid a best evidence objection.

2. Under existing law, do the exceptions swallow the rule?

There are numerous exceptions and qualifications to the best evidence rule. For example, both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original," meaning a Xerox copy, so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original. (Evidence Code § 260; Federal Rule of Evidence 1001(4).)

Moreover, the best evidence rule itself contains many other exceptions to the requirement that the original be produced, including:

- Printed representations of computer information and computer programs. (Section 1500.5.)
- Printed representations of images stored on video or digital media. (Section 1500.6.)
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence. (Sections 1501, 1505.)
- Secondary evidence of unavailable writings. (Sections 1502, 1505.)

- Secondary evidence of writings an opponent has, but fails to produce as requested. (Sections 1503(a), 1505.)
- Secondary evidence of collateral writings that would be inexpedient to produce. (Sections 1504, 1505.)
- Secondary evidence of writings in the custody of a public entity. (Sections 1506, 1508.)
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute. (Sections 1507, 1508.)
- Secondary evidence of voluminous writings. (Section 1509.)
- Copies of writings that were produced at the hearing and made available to the other side. (Section 1510.)
- Certain official records and certified copies of writings in official custody. (Sections 1530-1532.)
- Photographic copies made as business records. (Section 1550.)
- Photographic copies of documents lost or destroyed, if properly certified. (Section 1551.)
- Copies of business records produced in compliance with Sections 1560-1561. (Sections 1562, 1564, 1566.)

Proponents of the bill contend that when considering these exceptions combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Furthermore, they contend that creating any further exceptions to the rule is not an inviting option. Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, they assert that this bill would state a straightforward rule, adaptable to new technologies.

3. <u>The proposed secondary evidence rule</u>

The bill would provide that, in addition to an otherwise admissible original, the content of a writing may be proved by otherwise admissible secondary evidence, unless: (1) a genuine dispute exists concerning material terms of the writing and justice requires the exclusion of the evidence; or (2) admission of the secondary evidence would be unfair.

The bill would preserve existing law governing the admissibility of oral testimony to prove the content of a writing, providing that generally oral testimony is not admissible to prove the content of a writing. Likewise, any document still would have to be authenticated before it is admissible.

The Law Revision Commission asserts that in light of the broad exceptions to the best evidence rule, adoption of the secondary evidence rule will not make a dramatic change in existing practice, but would make the law more straightforward, efficient, just and workable.

a. Rule in criminal cases

Proposed Evidence Code Section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. The section would not apply to: a duplicate; a writing that is not closely related to the controlling issues in the action; a copy of a writing in the custody of a public entity; a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

b. Secondary evidence in preliminary examination

Proposed Penal Code Section 872.5 replaces existing Penal Code Section 872.5, which provides that the best evidence rule shall not apply to preliminary examinations. The proposed section would provide that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

4. Opposition

The opponents of the bill point to several problems with the proposed secondary evidence rule, including: (1) it shifts the burden of proof from the proponent to the opponent of secondary evidence; (2) it does not define what constitutes secondary evidence; (3) it appears to change the burden of appeal from a preponderance of the evidence test to a substantial evidence test; and, (4) it fails to adequately deter fraud.

Essentially, the Department of Justice (DOJ) contends that because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures for authenticating documents are necessary to safeguard against fraud. DOJ believes that SB 177 would undermine these provisions by allowing secondary evidence as a primary means of proof.

Support: Miguel A. Mèndez, Stanford Law Professor.

Opposition: Office of the Attorney General, Department of Justice
California Attorneys for Criminal Justice
Municipal Court Judges' Ass., Los Angeles County (Section 6 only)

HISTORY

Source: California Law Revision Commission

Related Pending Legislation: None known

Prior Legislation: Ch. 299, Stats. 1965; Ch. 708, Stats. 1977; Ch. 933, Stats. 1983; AB 2897 (Bowler) Ch. 345, Stats. 1996; AB 1387 (Brulte) Ch. 642, Stats. 1996

Prior Vote: Senate Public Safety Committee (7-0)

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EXHIBIT E-5

SENATE COMMITTEE ON CRIMINAL PROCEDURE

Senator John Vasconcellos, Chair
1997-98 Regular Session

S B 1 7 7

SB 177 (Kopp)
As introduced
Hearing date: March 18, 1997
Evidence Code; Penal Code
MK:js

BEST EVIDENCE RULE

HISTORY

Source: California Law Revision Commission

Prior Legislation: Chapter 299, Stats. 1965
Chapter 708, Stats. 1977
Chapter 933, Stats. 1983
AB 2897 (Bowler) Chapter 345, Stats. 1996
AB 1387 (Brulte) Chapter 642, Stats. 1996

Support: Miguel A. Méndez, Stanford Law Professor

Opposition: California Attorneys for Criminal Justice (need further time to study)

KEY ISSUE

SHOULD THE "BEST EVIDENCE RULE" BE REPEALED AND REPLACED WITH A NEW RULE TO BE KNOWN AS THE "SECONDARY EVIDENCE" RULE?

PURPOSE

Existing law governing the proof of the content of a writing in a civil or criminal action or proceeding provides that "[e]xcept as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing." This is known as the "best evidence rule." (Evidence Code section 1500)

(More)

Existing law specifies exceptions to the best evidence rule including exceptions for computer information; a printed representation of image stored on video or digital media to prove existence and content of image; a copy of lost or destroyed writing; a copy of writing not otherwise reasonably procurable; a copy of writing not produced by opponent; a copy of writing not closely related to issues; secondary evidence other than a copy; a copy of a writing in custody of public entity; a copy of recorded writing; numerous accounts or writings; a copy of writing produced at hearing and available for inspection; and a duplicate of a writing; certain official records and certified copies of writings in official custody; photographic copies made as business records; photographic copies of documents lost or destroyed if properly certified; copies of business records produced in compliance with specified statutes. (Evidence Code sections 1500.5 et seq., sections 1530-1532, 15550, 1551, 1562, 1564, 1566)

This bill repeals the existing best evidence rule and replaces it with revised rules governing the proof of the content of a writing in a civil or criminal action which is to be known as the "secondary evidence rule".

Existing law provides that the best evidence rule shall not apply at preliminary examinations. (Penal Code section 872.5)

This bill provides that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

The purpose of this bill is to repeal the "best evidence rule" and replace it with the "secondary evidence rule".

COMMENTS

1. Need for the Bill

In its recommendation to repeal the best evidence rule and replace it with the secondary evidence rule proposed in this bill, the California Law Revision Commission states in part:

> The Best Evidence Rule is an anachronism. In yesterday's world of manual copying and limited pretrial discovery, it served as a safeguard against misleading use of secondary evidence. Under contemporary circumstances, in which high quality photocopies are standard and litigants have broad opportunities for pretrial inspection of original documents, the Best Evidence Rule is no longer necessary to protect against unreliable secondary evidence. Because the rule's cost now

outweigh its benefits, the Law Revision Commission recommends that it be repealed.

2. The Best Evidence Rule

According to the Law Revision Comments to Evidence Code section 1500 the best evidence rule "is designed to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available."

The best evidence rule was created in 1965 (Chapter 299) and took effect on January 1, 1967. The best evidence rule was adopted upon a recommendation from the California Law Revision Commission and was adapted from Code of Civil Procedure sections existing at that time. At the time of its creation the rule contained 10 exceptions which either existed in law, were recognized elsewhere, or was the practice of courts at the time. Since then additional exceptions have been added.

The Evidence Code now contains many exceptions to the best evidence rule including:

- Printed representations of computer information and computer programs. (section 1500.5)
- Printed representations of images stored on video or digital media. (section 1500.6)
- Secondary evidence of writings that have been lost or destroyed without fraudulent intent of the proponent of the evidence. (sections 1501, 1505)
- Secondary evidence of unavailable writings. (sections 1502, 1505)
- Secondary evidence of writings an opponent has, but fails to produce as requested. (sections 1503(a), 1505)
- Secondary evidence of collateral writings that would be in expedient to produce. (sections 1504, 1505)
- Secondary evidence of writings in the custody of a public entity. (sections 1506, 1508)
- Secondary evidence of writings recorded in public records, if the record or an attested or certified copy is made evidence of the writing by statute. (sections 1507, 1508)
- Secondary evidence of voluminous writings. (section 1509)
- Copies of writings that were produced at the hearing and made available to the other side. (section 1510)
- Certain official records and certified copies of writings in official custody. (sections 1530-1532)
- Photographic copies made as business records. (section 1550)
- Photographic copies of documents lost or destroyed, if properly certified. (section 1551)
- Copies of business records produced in compliance with sections 1560-1561. (sections 1562, 1564, 1566)

3. Reasons for Repeal of the Best Evidence Rule

a. Rationale for best evidence rule no longer valid.

1) Fraud deterrence

The Law Revision Commission does believes that fraud deterrence as a reason for the best evidence rule is no longer valid. They note that "even where the Best Evidence Rule applies it may often be ineffective in preventing fraud. A litigant may fabricate secondary evidence and manufacture an excuse satisfying one of the rule's exceptions."[1] The Law Revision Commission report also notes that with the advent of new technologies such as scanning and manipulating signatures it is easy for an unscrupulous litigant to create false evidence and introduce it as original.

2) Minimizing misinterpretation

As noted above in section 2, one of the rationales for the best evidence rule is to minimize the possibilities of misinterpretation of writings. According to the Law Revision Commission this rationale is based on the fact that in litigation the exact words of the writing are often especially important, that an original document may provide clues to interpretation and that the secondary evidence may not faithfully reflect the original.

The Law Revision Commission Report states that while preventing misinterpretation of writings is an important goal modern discovery "undermines this as a justification for the Best Evidence Rule. Because litigants are able to examine original documents in discovery, they can discern inaccuracies and fraudulent tampering before trial, rather than unearthing such problems through the Best Evidence Rule in the midst of the trial."[2]

3) Other ways to safeguard against fraud and misinterpretation

The Law Revision Commission believes that the Best Evidence Rule is not the only protection against fraud and misinterpretation. The Commission believes that a party is motivated to present the most convincing evidence to support their case and thus using secondary evidence with no reasonable explanation will likely discount its probative value.

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[1] *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 379 (1996)
[2] *Best Evidence Rule*, 26 Cal. L. Revision Comm'n Reports 369, 381 (1996)

b. Cost of the best evidence rule

According to the Law Revision Commission Report the best evidence rule can cause a waste of time in judicial resources trying to determine in complicated situations, such as those relating to modern technologies, what is the original. It can also result in the exclusion of reliable evidence and lead to costly appeals. Finally, it may add to the cost of litigation by causing a litigant to expend time and resources hunting down the "original" in order to avoid a best evidence rejection.

4. Secondary Evidence Rule

The Law Revision Commission proposes replacing the best evidence rule with the secondary evidence rule. The Commission asserts that the secondary evidence rule will not dramatically alter the admissibility of secondary evidence to prove content but will be an easier rule for the courts and litigants to apply. No other jurisdiction has adopted a secondary evidence rule so there is no basis for which to evaluate its affect by experience.

a. Original still admissible to prove content

Proposed Evidence Code section 1520 states "[t]he content of a writing may be proved by an otherwise admissible original." This continues in part the existing 1500 by permitting proof of the content of a writing by an original of the writing.

b. Secondary evidence rule

Proposed Evidence Code section 1521 is the statement of the "secondary evidence rule." It states the general rule that the content of a writing may be proved by otherwise admissible evidence and then provides the circumstances under which the court shall exclude the evidence. These are: a genuine dispute exists concerning the material terms of the writing and justice requires the exclusion; or admission of the secondary evidence would be unfair.

This section also explicitly establishes that the proposed section 1523 determines when oral testimony is admissible to prove a writing.

Finally, this section provides that any document must still be authenticated before it is admissible.

c. Rule in criminal cases

Proposed Evidence Code section 1522 sets forth an exception for criminal cases because of their narrower discovery rules. It conditions use of secondary evidence

on making the original reasonably available for inspection if the proponent has it. The section does not apply to: a duplicate; a writing that is not closely related to the controlling issues in the action; a copy of a writing in the custody of a public entity; a copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

d. Oral testimony of content of writing

Proposed Evidence Code section 1523 preserves the existing law governing the admissibility of oral testimony to prove the content of a writing.

e. Computer printout

Proposed Evidence Code section 1552 continues existing section 1500.5 (c) and (d) without substantive change.

f. Printout of images stored on video or digital media

Proposed Evidence Code section 1553 continues a portion of existing section 1500.6 without substantive change.

g. Secondary evidence in preliminary examination

Proposed Penal Code section 872.5 replaces existing Penal Code section 872.5 which provided that the best evidence rule shall not apply to preliminary examinations. The proposed section provides that at a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

h. Photographic records of exhibits

In this bill Penal Code section 1417.7 is amended to reflect the repeal of the best evidence rule.

5. Uncodified Section

An uncodified section in this bill provides that the proposed changes in this bill would take effect on January 1, 1998. It also provides that nothing in the act applies to an action or proceeding commenced before the effective day or invalidates any evidentiary ruling made prior to the effective date.

6. Law Revision Commission Comments

The Law Revision Commission Comments to the proposed sections, while not codified, will be published as comments to the new sections in annotated codes.

7. Proponents/Opponents

The groups representing those interested in evidentiary issues are still in the process of reviewing and studying the proposals in this bill and thus have not taken final positions on this legislation.

8. Double-Referral for This Bill

SB 177 was referred to both this Committee and the Senate Committee on Judiciary. If it is approved by this Committee, it will be rereferred to the second policy committee.

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EXHIBIT E-6

SENATE COMMITTEE ON JUDICIARY
SENATOR JOHN BURTON, CHAIRMAN

BACKGROUND INFORMATION REQUEST

Measure: SB 177

Author : Senator Kopp

1. Origin of the bill:

   a. Who is the source of the bill? What person, organization, or governmental entity requested introduction?
   California Law Revision Commission
   Barbara Gaal (415) 494-1335

   b. Has a similar bill been before either this session or a previous session of the legislature? If so, please identify the session, bill number and disposition of the bill.
   No

   c. Has there been an interim committee report on the bill? If so, please identify the report.
   No

2. What is the problem or deficiency in the present law which the bill seeks to remedy?
   SB 177 would replace the Best Evidence Rule (Evidence Code Section 1500) and its many exceptions with a doctrine that would serve the same end and is more straightforward, erricient, just and adaptable to new technologies.

3. Please attach copies of any background material in explanation of the bill, or state where such material is available for reference by committee staff.
   See attached.

4. Please attach copies of letters of support or opposition from any group, organization, or governmental agency who has contacted you either in support or opposition to the bill.
   As of 3/19/97

5. If you plan substantive amendments to this bill prior to hearing, please explain briefly the substance of the amendments to be prepared.

6. List the witnesses you plan to have testify.
   Unknown

RETURN THIS FORM TO: SENATE COMMITTEE ON JUDICIARY
Phone 445-5957

STAFF PERSON TO CONTACT: Dan Friedlander (445-0503)

EXHIBIT E-7

March 18, 1997

SB 177 (KOPP)

Committee Statement (Criminal Procedure)

Replace Best Evidence Rule (Evid. C. § 1500) & its many broad exceptions with Secondary Evidence Rule

Best Evid. R. contributes to inefficiency of the legal system & high legal costs

- requires use of original to prove content of writing
- has so many & such broad exceptions, doesn't keep much out
- lawyers make money jumping through the hoop, but it's burden on litigants & judicial system
- problems are growing—identifying "the original" is not easy with new technology like electronic computer files & printouts, & email & the Internet

Best Evid. R. is no longer needed

- it dates from an earlier era, when there was no pretrial discovery—trial was only chance to unearth inaccuracies & fraudulent tampering
- today, discovery is broad & can examine originals before trial

Secondary Evid. R. proposed in SB 177 is better approach

- it would make a copy admissible to prove the content of a writing, unless (1) there is a genuine dispute concerning material terms of the writing, or (2) admission of the copy would be unfair. In those situations, the original would be required. In a criminal case, the original would also be required if the party seeking to prove the content of a writing has the original but has not produced it (with a few exceptions already in existing law).
- rule is simple, straightforward & reflects actual practice in the ordinary case. It is also adaptable to new technologies, which is of growing importance in California

SB 177 would implement a recommendation of the Law Revision Commission. Barbara Gaal, from the staff of the Commission, can provide additional background on the bill and respond to questions.

EXHIBIT E-8

REBUTTAL POINTS

Need Best Evid. Rule because it's so easy to manipulate or manufacture false evidence now.	Best Evid. Rule assumes original is harder to manipulate than copy. Today, it's easier to make a document that looks like an original than it used to be. New tech. is reason to replace Best Evid. Rule.
SB 177 would shift the burden of proof. The party opposing introduction of secondary evidence would have to justify exclusion of the evidence. The burden of proof should stay where it is now: The party offering secondary evidence should have to justify admission of such evidence.	The shift in burden of proof is justified because the Best Evid. Rule excludes evidence infrequently and those instances do not justify the cumulative burden that the rule imposes in other cases. SB 177 would help make the legal system more efficient and less costly.
Proposed Secondary Evid. Rule would not provide enough protection against misleading use of secondary evidence.	The Secondary Evid. Rule includes carefully considered safeguards. Parties also have strong incentives to use convincing evidence. If your opponent tries to pull a fast one by using secondary evidence instead of an original, you can argue that to the jury, or you can introduce the original, point out discrepancies, and destroy your opponent's credibility.
The proposed approach seems less clear & concrete than the Best Evid. Rule & its exceptions.	Secondary Evid. R. is based on a standard already in use in California & federal law for admission of duplicates. Case law interpreting that standard would provide guidance, also Commission's Comments.
California law should stay in conformity with federal law.	• Conformity doesn't exist now • Legislature should change the law when the time is ripe for reform, not when the federal gov't gets around to taking action.
SB 177 might change the standard of review on appeal.	Standard of review should not change, because exceptions to Secondary Evid. R. are mandatory, not discretionary. If concern about the standard of review is serious, could resolve by adding a provision specifying the standard.
Best Evid. R. works fine, don't change it.	Problems relating to new technology are starting to surface. E.g., Evid. C. § 1500.6 was enacted last year to deal with images on video or digital media. Concern about efficiency & cost of legal system is deep & this reform would help address it.

EXHIBIT E-9

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

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FACSIMILE: (916) 322-2630
(916) 324-5413

March 6, 1997

The Hon. Senator Quentin L. Kopp
State Capitol
Sacramento, CA 95814

RE: SB 177 (Kopp). Evidence: proof of the content of a writing.

Dear Senator Kopp:

The Office of the Attorney General has reviewed the captioned bill, and regrettably must oppose SB 177 unless it is amended.

As you are already aware, our office has previously expressed concerns regarding this bill. These concerns were provided in writing to Dan Friedlander on Friday, February 21, 1997 in the form of our departmental analysis. At Dan's suggestion, we discussed our concerns directly with counsel for the Law Revision Commission, upon whose recommendations the bill is reportedly based. Unfortunately, we were unable to resolve our objections during that discussion.

It is our fundamental position that because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures for authenticating documents are necessary to safeguard against fraud. Presently, SB 177 would undermine these provisions by allowing secondary evidence as a primary means of proof.

The admissibility of secondary evidence under the rules in SB 177 would arguably be subject to a substantial evidence test if challenged on appeal, thus deviating from the current standard of preponderance of the evidence. This, coupled with the bill's shift in the burden of proof from the proponent of the evidence to the opponent means the secondary evidence admitted to prove the content of a writing will not be subject to the same scrutiny as it is today. We believe the danger in adopting this revision outweighs any benefit that might be derived. Recognizing the need for greater efficiency in these matters, however, we would propose an alternative approach.

Rather than eliminate the best evidence rule under the code, we would suggest as an alternative to the secondary evidence rule expansion of the current exception to the best evidence rule found presently in section 1510 of the Evidence Code. We propose to allow a copy of a writing to be admissible if the original has been produced during discovery and made available for inspection by the adverse party (not simply if the original is produced at hearing, as section 1510 currently provides).

Relaxing the best evidence rule in this manner will improve efficient use of the court's and counsel's time, while maintaining necessary protection for the integrity of the evidentiary process relative to proof of the content of a writing. To do more, however, will likely produce greater difficulties at trial and possibly result in unnecessary appellate issues.

Deputy Attorney General William L. Carter will be available to discuss our concerns relative to the bill's hearing in the Senate Criminal Procedure Committee on March 11, 1997. If I may provide further assistance on this or other matters, please do not hesitate to call.

Sincerely,

DANIEL E. LUNGREN
Attorney General

STEPHEN M. BOREMAN
Deputy Attorney General

Cc: Senate Criminal Procedure Committee
Charles Fennessy, Governor's Office
William L. Carter, D.A.G.

EXHIBIT E-10

California Attorneys for Criminal Justice

CACJ

Senator Quentin Kopp
State Capitol - Room 2057
Sacramento, CA 95814

March 6, 1997 Re: SB 177

Dear Senator Kopp:

CACJ regrets to inform you of our opposition to SB 177, relating to evidence.

While some revision of the existing best evidence rule may make sense, there are provisions in SB 177 which we believe may unduly harm the rights of criminal defendants. We believe that further time is needed to allow all affected parties to consider whether and how these statutory provisions should be revised.

If you or your staff wish to discuss this further, please contact me at my office.

Very truly yours,

Katherine Sher
Legislative Advocate

cc: Members and consultants,
Senate Criminal Procedure Committee

EXHIBIT E-11

Post-it™ Fax Note 7671	Date	# of pages ▶ 7
To Kyla	From Jodi	
Co./Dept.	Co.	
Phone #	Phone #	
Fax 9-447-9008	Fax #	

State of California
DEPARTMENT OF JUSTICE

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FACSIMILE: (916) 322-2630
(916) 324-5413

March 6, 1997

The Hon. Senator Quentin L. Kopp
State Capitol
Sacramento, CA 95814

RE: SB 177 (Kopp). Evidence: proof of the content of a writing.

Dear Senator Kopp:

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It is our fundamental position that because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures for authenticating documents are necessary to safeguard against fraud. Presently, SB 177 would undermine these provisions by allowing secondary evidence as a primary means of proof.

The admissibility of secondary evidence under the rules in SB 177 would arguably be subject to a substantial evidence test if challenged on appeal, thus deviating from the current standard of preponderance of the evidence. This, coupled with the bill's shift in the burden of proof from the proponent of the evidence to the opponent means the secondary evidence admitted to prove the content of a writing will not be subject to the same scrutiny as it is today. We believe the danger in adopting this revision outweighs any benefit that might be derived. Recognizing the need for greater efficiency in these matters, however, we would propose an alternative approach.

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Relaxing the best evidence rule in this manner will improve efficient use of the court's and counsel's time, while maintaining necessary protection for the integrity of the evidentiary process relative to proof of the content of a writing. To do more, however, will likely produce greater difficulties at trial and possibly result in unnecessary appellate issues.

Deputy Attorney General William L. Carter will be available to discuss our concerns relative to the bill's hearing in the Senate Criminal Procedure Committee on March 11, 1997. If I may provide further assistance on this or other matters, please do not hesitate to call.

Sincerely,

DANIEL E. LUNGREN
Attorney General

STEPHEN M. BOREMAN
Deputy Attorney General

Cc: Senate Criminal Procedure Committee
Charles Fennessy, Governor's Office
William L. Carter, D.A.G.

EXHIBIT E-12

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
415-494-1335

PETE WILSON, Governor

RECEIVED
MAR 10 1997

March 6, 1997

Hon. John Burton
State Capitol, Room 4074
Sacramento, CA 95814

Re: SB 177 — Proof of the content of a writing

Dear Senator Burton:

SB 177 (Kopp) would implement a recommendation of the California Law Revision Commission to repeal the Best Evidence Rule and its extensive exceptions, and enact a more straightforward and modern rule governing proof of the content of a writing.

The Best Evidence Rule dates from the eighteenth century, when pretrial discovery was nonexistent and manual copying was the norm. Now, with broad pretrial discovery and rapidly changing technology, its focus on introducing an original document at trial creates unnecessary problems. Last year's enactment of yet another exception to the Best Evidence Rule (Evid. Code § 1500.6) foreshadows future difficulties in applying the rule to new technology.

While lawyers may profit from such disputes, most citizens would be better-served by enactment of the realistic rule proposed in SB 177. Known as the Secondary Evidence Rule, the proposed new rule would make secondary evidence (other than oral testimony) generally admissible to prove the content of a writing. The rule incorporates carefully considered safeguards, including two mandatory exceptions and a special provision to account for the differing discovery standards in civil and criminal cases.

The enclosed Commission report explains the bill in greater detail (see esp. pp. 391-94, which set forth the Commission's Comments to key sections of the bill). Please call me if you have any questions. I will also be available at the hearing on March 11, 1997, to explain provisions of the bill and respond to inquiries.

Sincerely,

Barbara S. Gaal
Staff Counsel

File: SB 177
Enc. Recommendation (Best Evidence Rule)

Fax: 415-494-1827 Website: http://www.clrc.ca.gov Email: bgaal@clrc.ca.gov

EXHIBIT E-13

STATE OF CALIFORNIA PETE WILSON, Governor

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Email: *addressee*@clrc.ca.gov

March 11, 1997

VIA FAX
Stephen M. Boreman
Deputy Attorney General
Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 92444-2550

Re: SB 177 (Proof of content of a writing)

Dear Mr. Boreman:

Senator Kopp's office forwarded to me a copy of your letter dated March 6, 1997, expressing concern about SB 177 and proposing to amend the bill to expand Evidence Code Section 1510's exception to the Best Evidence Rule.

The Law Revision Commission appreciates your office's concrete suggestion on how to improve SB 177 to meet your concerns. In formulating its recommendation, the Commission considered the important issues you raise regarding the scope of discovery. Your letter and my conversations with you and Mr. Carter have provided additional insights on the matter.

Creating a further exception to the Best Evidence Rule is not an inviting option. As a commentator aptly explained, legal history

> is largely a study of slow and cumbersome change. Rather than swift reform of a rule of law when needed, there is usually a gradual whittling away through interpretations, exceptions and limitations until there is little left, and that little is then ignored.
>
> [Taylor, *The Case for Secondary Evidence*, Case & Comment 46, 48 (Jan.-Feb. 1976).]

Instead of continuing a legal doctrine in which the exceptions are swallowing the rule, SB 177 focuses on stating a straightforward rule, adaptable to new technologies.

You, Mr. Carter, and others have expressed dissatisfaction with the way reciprocal discovery is working in criminal cases. The Commission's proposed Section 1522 (exclusion of secondary evidence in criminal action) is intended to address those problems. Perhaps revising Section 1522 as follows would help meet your concerns:

> 1522. (a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the

content of a writing if ~~the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial~~ the evidence is offered against a party who conducted discovery with due diligence but the original was not made reasonably available to that party for inspection at or before trial. In determining whether the original was made reasonably available, the court shall consider the timing, manner, and location of production, the technology of the writing, and any other relevant circumstances

(b) This section does not apply to any of the following:

(1) A duplicate as defined in Section 260.

(2) A writing that is not closely related to the controlling issues in the action.

(3) A copy of a writing in the custody of a public entity.

(4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

~~(b)~~ (c) In a criminal action, a request to exclude secondary evidence of the content of a writing under this section or otherwise shall not be made in the presence of the jury.

In effect, this revision would mean that if a party conducts diligent discovery in a criminal action, as a general rule secondary evidence of the content of a writing could not be introduced against the party unless the original was made reasonably available to the party at or before trial.

With respect to civil cases, proposed Section 1521(b) requires a court to exclude secondary evidence of the content of a writing if admission of the evidence would be unfair. The Commission's Comment makes clear that whether the original was produced in discovery is an important factor to consider in applying this provision:

> Courts may consider a broad range of factors, for example: (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated, (2) whether the original was suppressed in discovery, (3) whether discovery conducted in a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original, (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to interpretation), (5) whether the original is unavailable and, if so, why, and (6) whether the writing is central to the case or collateral. A classic circumstance for exclusion pursuant to subdivision (a)(2) is if the proponent destroyed the original with fraudulent intent or the doctrine of spoliation of evidence otherwise applies.

Would your office's concern about SB 177's impact on civil cases be alleviated to any extent by moving some of this language from the Comment to the text of Section 1521?

Finally, your letter to Senator Kopp expresses concern about how SB 177 would affect the standard of review on appeal. That issue could be resolved by amending the bill to include a provision specifying the standard of review. We would appreciate suggestions on drafting such a provision, including citations

to authorities specifying the current standard of review, which the Commission could include in its Comment.

We trust that your office will carefully consider these ideas, and let us know your views. The Commission is dedicated to achieving effective law reform and respects and appreciates the Attorney General's contributions to this process.

Sincerely,

Barbara S. Gaal
Staff Counsel

File: SB 177
cc: Senator Kopp
Senate Committee on Criminal Procedure

EXHIBIT E-14

STANFORD LAW SCHOOL, STANFORD, CALIFORNIA 94305-8610

MIGUEL A. MÉNDEZ
Adelbert H. Sweet Professor of Law

Tel (415) 723-0613
Fax (415) 725-8901
Email: mmendez@leland.stanford.edu

March 12, 1997

Hon. John Vasconcellos
State Capitol, Room 4061
Sacramento, CA 95814

Re: California Law Revision's Best Evidence Rule Recommendation

Dear Senator Vasconcellos:

I am writing to share with your committee my assessment of the California Law Revision's Best Evidence Rule Recommendation. I am a tenured professor at Stanford Law School, where I have taught for almost 20 years. One of my specialties is evidence. I have published extensively in the field and am the author of California Evidence (West 1993), a treatise that discusses the California Evidence Code as construed by the appellate courts and compares differences between the California and federal approaches to admissibility.

The Best Evidence Rule requires a party to prove the contents of a writing by offering the original of the writing in evidence. Subject to certain exceptions, the rule prohibits the proponent from proving the contents of the writing by testimony recounting its contents or by a copy of the writing. The rule is designed principally to minimize the risks of misinterpretation that could occur if the production of the original writing were not required.

The rule originated in the 18th century when pretrial discovery was virtually nonexistent and manual copying was the only means of reproducing documents. With the advent of new technologies capable of reproducing documents accurately, the justification for the rule was seriously undermined. Both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original." A duplicate is a copy of the original "produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent

techniques which accurately reproduces the original."[1] In other words, a "xerox" copy will do so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original.

The need to produce the "original" has been diminished further by the advent of computer-based word processing programs. The version of the document stored in the computer's memory would strike many computer users to be the "original" and not any particular printout made from the stored document. A recent amendment to the Evidence Code now recognizes that printouts of images stored on digital media may be offered to prove "the existence and content of the image stored on the * * * digital media."[2]

The Best Evidence Rule itself contains numerous exceptions to the requirement that the original be produced. Combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Of course, if a nontrivial dispute arises over the existence of the original or its terms, the court may order that proof be made by the original document.

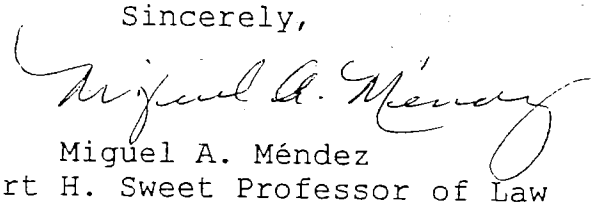
In civil cases, today's broad pretrial discovery practices make it unlikely that a dispute over the genuineness of the original document will erupt at trial. Parties have ample opportunities to examine prior to the trial the documents their opponents plan to offer. Consequently, the need in civil cases for a rule requiring the use of the original to prove the contents of a writing is hardly justified. Indeed, technological innovations and contemporary pretrial discovery practices call for the opposite approach recommended by the Law Revision Commission: a rule that expressly allows the use of copies to prove the contents of the original unless a genuine dispute arises over the existence or terms of the original, or the court finds that admitting the copy would be unfair to the opponent under the circumstances. The Commission's recommended rule preserves the sensible requirement that, where a written copy is available, it should be preferred over testimony. Accordingly, I concur in the recommendation that the Best Evidence Rule be abolished and replaced with a general rule favoring the admissibility of secondary as well as of original writings to prove the contents of the original writing.

---

[1]California Evidence Code § 260; Federal Rule of Evidence 1001(4).

[2]California Evidence Code § 1500.6.

Sincerely,



Miguel A. Méndez
Adelbert H. Sweet Professor of Law

EXHIBIT E-15

STANFORD LAW SCHOOL, STANFORD, CALIFORNIA 94305-8610

MIGUEL A. MÉNDEZ
Adelbert H. Sweet Professor of Law

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Email: mmendez@leland.stanford.edu

March 12, 1997

Hon. John Vasconcellos
State Capitol, Room 4061
Sacramento, CA 95814

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In civil cases, today's broad pretrial discovery practices make it unlikely that a dispute over the genuineness of the original document will erupt at trial. Parties have ample opportunities to examine prior to the trial the documents their opponents plan to offer. Consequently, the need in civil cases for a rule requiring the use of the original to prove the contents of a writing is hardly justified. Indeed, technological innovations and contemporary pretrial discovery practices call for the opposite approach recommended by the Law Revision Commission: a rule that expressly allows the use of copies to prove the contents of the original unless a genuine dispute arises over the existence or terms of the original, or the court finds that admitting the copy would be unfair to the opponent under the circumstances. The Commission's recommended rule preserves the sensible requirement that, where a written copy is available, it should be preferred over testimony. Accordingly, I concur in the recommendation that the Best Evidence Rule be abolished and replaced with a general rule favoring the admissibility of secondary as well as of original writings to prove the contents of the original writing.

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Sincerely,

Miguel A. Méndez

Miguel A. Méndez
Adelbert H. Sweet Professor of Law

EXHIBIT E-16

MUNICIPAL COURT JUDGES' ASSOCIATION
LOS ANGELES COUNTY, CALIFORNIA

RAY L. HART, *Chair*
JOHN V. MEIGS, *Vice-Chair*
KATHLEEN KENNEDY-POWELL, *Secretary*
PHILLIP J. ARGENTO, *Treasurer*
MICHELLE R. ROSENBLATT, *Chair of Legislation Committee*

March 20, 1997

Senate Judiciary Committee
2205 Capitol Building
Sacramento, California 95814

Re: SB 177 (Kopp)

Dear Committee Members:

The Los Angeles County Municipal Court Judges' Association supports in part and opposes in part SB 177, which would revise the provisions of the Evidence Code regarding proof of the content of a writing.

We believe that most of the provisions of this bill would simplify and clarify proceedings regarding proof of the content of a writing. We are opposed, however, to section 6 of the bill, deleting the provision that "the best evidence rule does not apply to preliminary examinations" (Penal Code §872.5), as well as section 7, providing that otherwise admissible originals or secondary evidence may be used to prove the content of a writing in a preliminary examination. These changes would unnecessarily complicate and extend preliminary hearings, and should therefore be omitted from the bill.

Sincerely,

Michelle R Rosenblatt

Michelle R. Rosenblatt
Chair, MCJA Legislation Committee

cc: Chief Counsel

COUNTY COURTHOUSE • 110 N. GRAND AVENUE, ROOM 620 • LOS ANGELES, CA 90012 • PHONE (213) 974-6709 • FAX (213) 680-9702

EXHIBIT E-17

MUNICIPAL COURT JUDGES' ASSOCIATION
LOS ANGELES COUNTY, CALIFORNIA

March 20, 1997

The Honorable John Burton, Chair
Senate Judiciary Committee
313 Capitol Building
Sacramento, California 95814

Re: SB 177 (Kopp)

Dear Senator Burton:

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Sincerely,

Michelle R Rosenblatt

Michelle R. Rosenblatt
Chair, MCJA Legislation Committee

cc: Chief Counsel

EXHIBIT E-18

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550
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FACSIMILE: (916) 322-2630
(916) 324-5413

File: SB177 March 23, 1997

Barbara Gaal, Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: SB 177: The Secondary Evidence Rule

Dear Ms. Gaal:

This letter is in response to your recent letter regarding SB 177 and concerns expressed by our office relative to this bill.

The State Bar Committee on Rules and Procedure favors retention of the best evidence rule, because the rule is sound. The Bar Commission on Administration of Justice comments that the best evidence rule may be more necessary than ever, since advances in technology have made it easier to forge documents. The Bar Litigation Section highlights four problems with the proposed secondary evidence rule: it shifts the burden of proof from the proponent to the opponent of secondary evidence; it does not define what constitutes secondary evidence; it appears to change the burden on appeal from a preponderance of the evidence test to a substantial evidence test; and, it fails to adequately deter fraud. The Attorney General is particularly concerned about the lack of fraud deterrence and the shifting of the burden of proof.

To respond to these problems, you have suggested that use of secondary evidence be conditioned upon the consideration of factors such as whether secondary evidence is being used in an unanticipated matter; whether the original was suppressed or reasonably obtainable during discovery; whether there are dramatic differences between the original and secondary evidence; whether the original is unavailable; and whether the writing is central to the case or collateral.

Unfortunately, utilization of these factors does not solve the problem. Conditioning admissibility of secondary evidence on whether its use is unanticipated or the writing is collateral is vague; these terms are undefined. Furthermore, use of secondary evidence may be fully anticipated, and the evidence may

nevertheless be fraudulent. Determination of fraud may not be possible without examining the original. Moreover, it can never be known in advance whether a jury will consider any piece of evidence critical or merely collateral, especially if the jury cannot tell from secondary evidence whether the evidence is legitimate or is a deception.

Documents may come to light during trial, for example during rebuttal. A party may enter a case late in the discovery process. Therefore, that a writing was not suppressed, or may have been obtainable during discovery, does not dispense with the importance of examining the original writing. Even subtle differences between an original and secondary evidence may be critical, and these differences may not be discernable without reference to the original.

We believe the best evidence rule should be retained to deter against fraud, especially since fraud may not be apparent without reference to the original. In this context, the burden should be on the proponent of secondary evidence to show that the original is unavailable, not the other way around. If an original is unavailable, there are exceptions to the best evidence rule which allow the use of secondary evidence.

Again, thank you for sharing your thoughts relative to SB 177, and for your willingness to consider alternative viewpoints.

Sincerely,

DANIEL E. LUNGREN
Attorney General

STEPHEN M. BOREMAN
Deputy Attorney General

cc: The Honorable Quentin Kopp,
California State Senate
Mr. William Carter, Deputy Attorney General
Civil Law Division

EXHIBIT E-19

FAX

attn: Jody

To: Gene Wong, Senate Judiciary

Fax #: ~~323-7224~~ 445-8390

Subject: SB 177 Kopp

Date: 5-9-97

Pages: 3, including this cover sheet

COMMENTS: FYI
We submitted this oppose letter on 3-6-97, but Senate Crim. Pro. failed to note our concerns & opposition when this bill was subsequently heard on 3-13-97.

From the desk of . . .
STEPHEN M. BOREMAN
Deputy Attorney General
Legislative Affairs
Office of the Attorney General
1300 I Street, Suite 1790
Sacramento, CA 95814

(916) 324-5413
Fax: (916) 322-2630

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

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FACSIMILE: (916) 322-2630
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March 6, 1997

The Hon. Senator Quentin L. Kopp
State Capitol
Sacramento, CA 95814

RE: SB 177 (Kopp). Evidence: proof of the content of a writing.

Dear Senator Kopp:

The Office of the Attorney General has reviewed the captioned bill, and regrettably must oppose SB 177 unless it is amended.

As you are already aware, our office has previously expressed concerns regarding this bill. These concerns were provided in writing to Dan Friedlander on Friday, February 21, 1997 in the form of our departmental analysis. At Dan's suggestion, we discussed our concerns directly with counsel for the Law Revision Commission, upon whose recommendations the bill is reportedly based. Unfortunately, we were unable to resolve our objections during that discussion.

It is our fundamental position that because reciprocal discovery is not working effectively in either civil or criminal forums, the best evidence rule, foundational requirements for secondary evidence of a writing, and provisions of the Code of Civil Procedure which establish procedures for authenticating documents are necessary to safeguard against fraud. Presently, SB 177 would undermine these provisions by allowing secondary evidence as a primary means of proof.

The admissibility of secondary evidence under the rules in SB 177 would arguably be subject to a substantial evidence test if challenged on appeal, thus deviating from the current standard of preponderance of the evidence. This, coupled with the bill's shift in the burden of proof from the proponent of the evidence to the opponent means the secondary evidence admitted to prove the content of a writing will not be subject to the same scrutiny as it is today. We believe the danger in adopting this revision outweighs any benefit that might be derived. Recognizing the need for greater efficiency in these matters, however, we would propose an alternative approach.

Rather than eliminate the best evidence rule under the code, we would suggest as an alternative to the secondary evidence rule expansion of the current exception to the best evidence rule found presently in section 1510 of the Evidence Code. We propose to allow a copy of a writing to be admissible if the original has been produced during discovery and made available for inspection by the adverse party (not simply if the original is produced at hearing, as section 1510 currently provides).

Relaxing the best evidence rule in this manner will improve efficient use of the court's and counsel's time, while maintaining necessary protection for the integrity of the evidentiary process relative to proof of the content of a writing. To do more, however, will likely produce greater difficulties at trial and possibly result in unnecessary appellate issues.

Deputy Attorney General William L. Carter will be available to discuss our concerns relative to the bill's hearing in the Senate Criminal Procedure Committee on March 11, 1997. If I may provide further assistance on this or other matters, please do not hesitate to call.

Sincerely,

DANIEL E. LUNGREN
Attorney General

STEPHEN M. BOREMAN
Deputy Attorney General

Cc: Senate Criminal Procedure Committee
Charles Fennessy, Governor's Office
William L. Carter, D.A.G.

EXHIBIT E-20

California Attorneys for Criminal Justice

CACJ

Senator Quentin Kopp
State Capitol - Room 2057
Sacramento, CA 95814

January 7, 1998 Re: SB 177

Dear Senator Kopp:

CACJ regrets to inform you of our opposition to SB 177, relating to evidence.

We know of no evidence to suggest that the best evidence rule in existing law is failing to function. The rule and its interpretation is well understood by the courts and attorneys. Any change of the rule will require time and energy to be spent by the courts and litigants on interpreting and applying the new rule — when no change is needed.

There are also some substantive dangers to changing this rule. In an era where it is increasingly easy to produce a duplicate or an altered duplicate that is difficult to detect, it makes little sense to shift the burden from the proponent of secondary evidence to show that the evidence should be admitted to the opponent of admission of evidence. In most cases, the best evidence rule is little hindrance to the admission of evidence, but in some cases it does provide a safeguard. The danger that evidence will be less carefully scrutinized before admission is particularly great in criminal cases where there is not the broad discovery that exists in criminal cases.

If you or your staff wish to discuss this further, please contact me at my office.

Very truly yours,

Katherine Sher

Katherine Sher
Legislative Advocate

cc: Members and consultants,
Senate Judiciary Committee

LEGISLATIVE ADVOCATE
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Sacramento, CA 95814
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Los Angeles, CA 90010
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EXHIBIT E-21

California Law Revision Commission		From: Barbara Gaal Date: Wednesday, January 7, 1998
4000 Middlefield Road, Room D-1 Palo Alto, CA 94303-4739	Voice: 650-494-1335 Fax: 650-494-1827	Pages: 3 Fax To: 916 445-8390

TO: Jodi Remke, Senate Judiciary Committee

STATE OF CALIFORNIA PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
415-494-1335

January 7, 1998

VIA FAX
Jodi Remke, Counsel
Senate Committee on Judiciary
State Capitol, Room 2205
Sacramento, CA 95814

RECEIVED
JAN 07 1998

Re: SB 177 — Proof of the content of a writing

Dear Jodi:

SB 177 (Kopp) would implement a recommendation of the California Law Revision Commission to repeal the Best Evidence Rule and its extensive exceptions, and enact a more straightforward and modern rule governing proof of the content of a writing.

Under the Best Evidence Rule, a litigant proving the content of a writing must use the original document. The rule developed when pretrial discovery was nonexistent and manual copying was standard. Now, litigants routinely inspect original documents in discovery and new technologies blur the distinction between an original document and secondary evidence. The recent enactment of yet another exception (Evid. Code § 1500.6) to the Best Evidence Rule foreshadows future difficulties in applying the rule to new technology.

While lawyers may profit from such disputes, most citizens would be better-served by the realistic and efficient rule proposed in SB 177. Known as the Secondary Evidence Rule, the proposed new rule would make secondary evidence (other than oral testimony) generally admissible to prove the content of a writing. The rule incorporates carefully considered safeguards, including two mandatory exceptions and a special provision for criminal cases.

The Law Revision Commission's report explains the bill in greater detail (see esp. pp. 391-94, which set forth the Commission's Comments to key sections of the bill). I will be in Sacramento tomorrow and will stop by your office to see if you have any questions about the bill.

Sincerely,

Barbara Gaal

Barbara S. Gaal
Staff Counsel

File: SB 177

EXHIBIT E-22

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
415-494-1335

RECEIVED
JAN 13 1998

January 7, 1998

Hon. John Burton
State Capitol, Room 4074
Sacramento, CA 95814

Re: SB 177 — Proof of the content of a writing

Dear Chairman Burton:

SB 177 (Kopp) would implement a recommendation of the California Law Revision Commission to repeal the Best Evidence Rule and its extensive exceptions, and enact a more straightforward and modern rule governing proof of the content of a writing.

Under the Best Evidence Rule, a litigant proving the content of a writing must use the original document. The rule developed when pretrial discovery was nonexistent and manual copying was standard. Now, litigants routinely inspect original documents in discovery and new technologies blur the distinction between an original document and secondary evidence. The recent enactment of yet another exception (Evid. Code § 1500.6) to the Best Evidence Rule foreshadows future difficulties in applying the rule to new technology.

While lawyers may profit from such disputes, most citizens would be better-served by the realistic and efficient rule proposed in SB 177. Known as the Secondary Evidence Rule, the proposed new rule would make secondary evidence (other than oral testimony) generally admissible to prove the content of a writing. The rule incorporates carefully considered safeguards, including two mandatory exceptions and a special provision for criminal cases.

The enclosed Commission report explains the bill in greater detail (see esp. pp. 391-94, which set forth the Commission's Comments to key sections of the bill). Please call if you would like to discuss any aspect of the bill. I will also be available at the hearing on Tuesday, January 13, 1998, to answer questions.

Sincerely,

Barbara S. Gaal
Staff Counsel

File: SB 177
Enc. Recommendation (Best Evidence Rule)

Fax: 415-494-1827 Website: http://www.clrc.ca.gov Email: bgaal@clrc.ca.gov

EXHIBIT E-23

1/8/98 1:40 PM

Hi, Jodi.

I stopped by to see if you had any questions re SB 177. One possibility we've been discussing with CACJ is limiting the reform to civil cases (that would automatically take care of the Muni Court Judges' Ass'n concern re preliminary hearings). To my knowledge, CACJ hasn't decided its position on such an Amendment yet — in part because they want to know CAOC's position.

I'll try to call or stop back again later this afternoon.

Barbara Graf
650-494-1335

EXHIBIT E-24

UNIVERSITY OF CALIFORNIA, DAVIS

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SCHOOL OF LAW

400 MRAK HALL DRIVE
DAVIS, CALIFORNIA 95616-5201

June 5, 1998

The Honorable Martha M. Escutia, Chairwoman
Assembly Committee on Judiciary
ATTN: Mr. Daniel Pone, Esq.
State Capitol
P. O. Box 942849
Sacramento, California 94249-0001

Dear Assemblywoman Escutia:

RE: SB 177 (Kopp) — Oppose Unless Amended

By way of introduction, I am a member of the law faculty of the University of California, at Davis. Evidence is my primary area of expertise. I am a former chair of the Evidence Section of the American Association of Law Schools. I am a coauthor of several texts, including IMWINKELRIED AND HALLAHAN'S CALIFORNIA EVIDENCE CODE ANNOTATED (Bancroft-Whitney 1998), CALIFORNIA EVIDENTIARY FOUNDATIONS (2d ed. 1994), and CALIFORNIA OBJECTIONS AT TRIAL (1992). I recently served as a member of the Editorial Board for JEFFERSON'S CALIFORNIA EVIDENCE BENCHBOOK (2d ed. 1997). I am one of the team of scholars presently at work revising the Wigmore Evidence treatise.

Mr. Pone kindly furnished me with a copy of Senator Kopp's bill and asked whether I had any comments. I have three short comments.

First, there certainly is little need to revise the current statutory scheme codifying the best evidence rule. In its November 1996 Best Evidence Rule report, the commission cites such authorities as a 1966 article by Professors Cleary and Strong, a 1969 article by Professor Broun, and the Wigmore treatise--all of which were written before the Federal Rules of Evidence were adopted and before our Evidence Code was amended to largely conform to the federal scheme. The commission does not cite a single contemporary article arguing that today the best evidence rule is a serious impediment to the search for truth. That silence speaks volumes. As prolific as legal commentators are, the silence indicates that there is a widespread, modern consensus that the best evidence rule has already been sufficiently liberalized.

On pages 386 and 387 of its report, the commission cites to a few recent cases which supposedly demonstrate that the current statutory scheme is "complicated" and presents interpretive "difficulties." Every year I monitor all the California cases on the best evidence rule for the new annual edition of the CALIFORNIA EVIDENCE CODE ANNOTATED and the annual supplement to CALIFORNIA EVIDENTIARY FOUNDATIONS. The number of best evidence cases cited by the commission is dwarfed by the number of cases handed down in such doctrinal areas as hearsay, opinion, and impeachment. The commission's characterization of the current statutes on pages 386 and 387 is misleading. In my judgment, the report exaggerates the need for any revision of our statutory best evidence provisions.

Second, the report repeatedly claims that the proposed statutory scheme will operate in a simpler, more straightforward fashion than the current provisions. At least in the short term, that is unlikely to prove true. Judges and attorneys are familiar with the current provisions--which is why those provisions generate so few published decisions annually. The proposed bill is hardly a model of clarity. Amazingly, even though the proposed bill uses the term, "secondary evidence," and is entitled the Secondary Evidence Rule, that expression is never defined. You are left to divine by inference that the expression includes, but is not limited, to duplicates which are mentioned only in { 1522.

Several months ago a member of the commission staff phoned me and solicited my reaction to the draft. I told her that the bill would be far more useful if it began with a section devoted to the relevant definitions, and then included in sequence:
--one section setting out the rules for the admissibility of duplicates,
--another section regulating the admissibility of writings other than duplicates, and
--a final section addressing the admissibility of oral testimony.
When a judge was presented with a best evidence objection, initially the judge would use the definitions in the first section to classify the proffered item of evidence. Having done so, the judge could then turn immediately to a section which prescribed the rules governing the admissibility of that classification of evidence. I made the point that it would be easier for judges and attorneys to use a statute organized in this fashion. During our conversation the staff person seemed to concede that point. Yet, this version of the bill is structured in the same awkward manner as the earlier draft.

Finally, it gives me pause that both the California Department of Justice and California Attorneys for Criminal Justice oppose the bill. I am neither a criminal practitioner nor a Criminal Law scholar. However, the staff of the Department of Justice and the membership of C.A.C.J. include a large number of veteran criminal practitioners. They seem quite concerned that the new bill will make it even more difficult for them to detect forgery in criminal cases. In my experience, the Department of Justice and C.A.C.J. are often at odds over proposed legislation affecting the criminal justice system. On those rare occasions when the department and C.A.C.J. join in opposing a bill, we should attach special weight to their concern.

I can validate one reason for that concern. I write the chapter in SCIENTIFIC EVIDENCE (2d ed. 1993) on questioned document examination. Any questioned document examiner would tell you that it is much easier for him or her to detect forgery when they are provided with the ink or

ribbon original. The use of a photocopy makes it more difficult to unmask a forgery. The current provisions of the Evidence Code go far in allowing the proponent to use photocopies, and the proposed bill will make it even easier to do so. By moving in that direction, the bill will make it harder to detect attempted fraud on the court. For that reason, I think that the concerns expressed by the Department of Justice and C.A.C.J. are at least partially warranted.

I hope that you find these comments useful.

Sincerely yours,

Edward Imwinkelried

Edward J. Imwinkelried
Professor of Law

cc. Senator Kopp

EXHIBIT E-25